

EDITOR'S NOTE

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65 Original

TITLE State of Texas, Plaintiff  
v.  
State of New Mexico

BOOKETED

COURT

June 27, 1980

Bill of Complaint

DATE

PROCEEDINGS AND ORDERS

June 22, 1984

DISTRIBUTED. 6-28 (In the Matter of appointment of a New Special Master).

June 27, 1984

STRICKEN from above conf.

July 2, 1984

The Honorable Jean Sala Breitensten, whose long and invaluable service to the Court in this case is deeply appreciated, has requested that he be relieved of his duties as Special Master, and the Court having granted that request, it is necessary that a Special Master be appointed to conclude this case. It is therefore ordered that Charles J. Meyers of Denver, Colorado, be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

July 30, 1984  
Dec. 20, 1985

Oath of the Special Master received.

→ Motion of the Special Master for interim fees and disbursements filed.

Dec. 30, 1985

DISTRIBUTED. 1/17/86. (Above motion).

Feb. 7, 1986

DISTRIBUTED. 2/21/86 (Above motion).

Feb. 24, 1986

The motion of the Special Master for allowance of interim fees and disbursements is granted and a total of \$34,213.09 is allowed. Chief Justice Burger, with whom Blackmun and Rehnquist, JJ., join, dissenting.

July 29, 1986 →

Report of the Special Master received.

Sept. 8, 1986

Motion of Special Master for interim fee allowance filed.

Sept. 10, 1986

DISTRIBUTED. 9/26/86. (Above motion).

Oct. 6, 1986

The Report of the Special Master is received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Replies thereto, if any, may be filed within 30 days. The motion of the Special Master for award of interim fee allowance is granted. Scalia, J., OUT.

(Over)

2 p



*Title*

No.

DATE

PROCEEDINGS AND ORDERS

Nov. 6, 1986	Order extending time to file the Exceptions and supporting brief to Report of Special Master granted for all parties to and including Dec. 19, 1986.
Dec. 18, 1986	Brief, amici curiae of The Incorporated Municipalities of Alamogordo, Artesia, et al., in support of New Mexico filed.
Dec. 18, 1986	Exception of the State of Texas to Report of Special Master and Brief in support filed.
Dec. 20, 1986	Exception of New Mexico to the Report of the Special Master and Brief in support filed.
Jan. 14, 1987	Order extending time to file 60 printed copies of Texas' reply to New Mexico's Exceptions to the Report of the Special Master until Jan. 23, 1987.
Jan. 20, 1987	New Mexico's answer brief in response to Texas' brief in support of exception filed.
Jan. 20, 1987	Reply by Texas filed.
Jan. 20, 1987	Brief, amicus curiae, of Red Bluff Water Powerl Control District in support of Recommendations of the Special Master filed.
Jan. 21, 1987	DISTRIBUTED. Feb. 20, 1987. (Exceptions of Texas to Report of the Special Master and reply of New Mexico and Exceptions of New Mexico to Report of Special Master and Reply of Texas).
Feb. 23, 1987	The Exceptions to the Report of the Special Master are set for oral argument in due course.
March 2, 1987	The motion of City of Alamogordo, New Mexico, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument is denied.
March 31, 1987	CIRCULATED.

RECEIVED

JUL 29 1986

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

NO. 65 ORIGINAL

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1985

STATE OF TEXAS,

*Complainant,*

v.

STATE OF NEW MEXICO,

*Defendant,*

THE UNITED STATES OF AMERICA,

*Intervenor.*

CHARLES J. MEYERS, SPECIAL MASTER

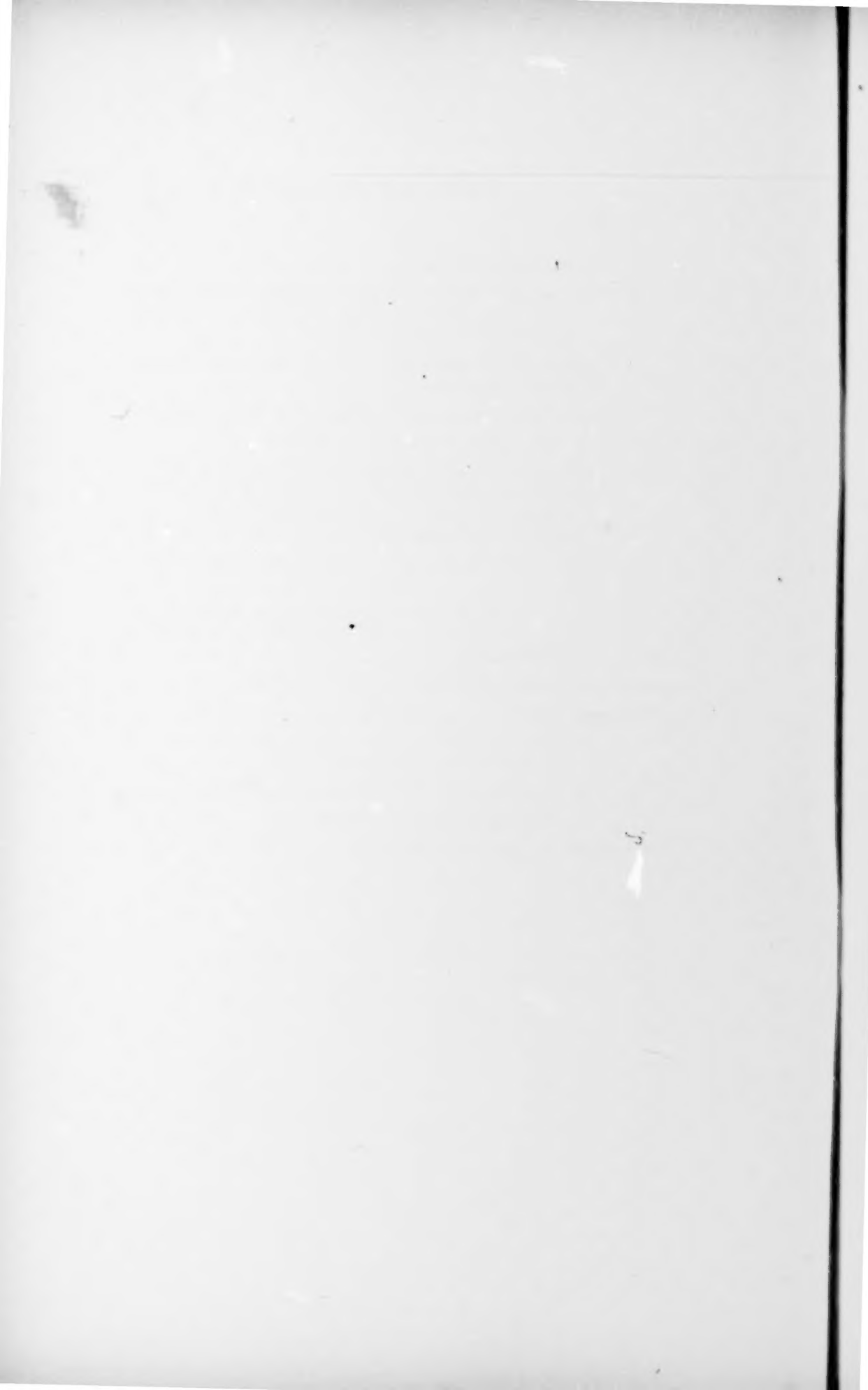
REPORT

July , 1986

51142

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. NEGATIVE DEPARTURES FROM NEW MEXICO'S DELIVERY OBLIGATION DURING THE PERIOD 1950-61 .....	4
III. NEGATIVE DEPARTURES DURING THE PERIOD 1962-1983 .....	6
A. "Man's Activities" and the 1947 Condition.....	7
B. Allocation of the Burden of Proof.....	9
IV. NEGATIVE DEPARTURES FROM NEW MEXICO'S DELIVERY OBLIGATION RESULTING FROM THE CONSTRUCTION OF MCMILLAN RESERVOIR TRAINING DIKE...	11
V. THE UPPER REACH ABOVE ALAMOGORDO DAM .....	22
VI. THE EFFECT OF PUMPING IN TEXAS ON STATE-LINE DEPARTURES: CAPITAN AQUIFER .....	26
VII. CLAIMS OF THE UNITED STATES.....	30
VIII. REMEDY .....	30
A. New Mexico's Obligation to Texas Under the Pecos River Compact.....	32
B. Retrospective Relief Under The Compact .....	38
C. Enforcement of the Decree.....	42
APPENDIX A: Proposed Decree	



## I

### INTRODUCTION

In its June 17, 1983 decision, *Texas v. New Mexico*, 462 U.S. 554, 574 (1983), the Supreme Court returned this case to the Special Master to answer "the crucial question that remains to be decided: '[H]as New Mexico fulfilled her obligations under Article III(a) of the Pecos River Compact?'" Pursuant to that mandate, the Honorable Jean S. Breitenstein, Special Master, filed with the Supreme Court a "Report and Recommendation" dated January 16, 1984. This Report was summarily approved on June 11, 1984 by the Supreme Court in *Texas v. New Mexico*, 467 U.S. 1238 (1984).<sup>1</sup> Subsequent to this affirmance, and pursuant to the Court's 1983 instructions, the Special Master has endeavored to resolve all of the remaining disputed issues, both of fact and law, between the parties.

In the Court's 1983 opinion, Justice Brennan admonished the parties to try to settle their differences in a spirit of cooperation:

Time and again we have counseled States engaged in litigation with one another before this Court that their dispute "is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted."

\* \* \* \*

It is within this Court's power to determine whether New Mexico is in compliance with Art. III(a) of the Pecos River Compact, but it is difficult to believe that the bona fide differences in the two States' views of how much water Texas is entitled to receive justify the expense and time necessary to obtain a judicial resolution of this controversy.

<sup>1</sup> On July 2, 1984 the Supreme Court accepted the resignation of the Honorable Jean S. Breitenstein as Special Master in this action and appointed Charles J. Meyers as Special Master to replace him. 104 S. Ct. 3568 (1984).

With that observation, we return this case to the Special Master for determination of the unresolved issues framed in his pretrial order, in a manner consistent with this opinion.

462 U.S. at 575-76 (citations omitted). The parties have honored Justice Brennan's request and have worked together in cooperation with the Special Master and his technical consultant to resolve the issues remaining in the case. I have consulted with the parties on at least seven occasions since my appointment in an effort to reach agreement on the disputed issues. One result of those meetings was an Order issued on July 8, 1985, adopting a "Stipulation On Disputed Technical Issues," which had been entered into by the parties on July 3, 1985. Subsequent to that Order, the parties continued to work with the Special Master, and his technical consultant, to reduce, as much as possible, the number of issues left to be resolved by adjudication.

Continuing in this spirit of cooperation, the parties, at the hearing on November 18, 1985, notified the Special Master that they had reached an agreement with regard to many of the disputed issues contained in the Pretrial Order of October 10, 1985.<sup>2</sup> Reporter's Transcript of Hearing, *Texas v. New Mexico*, No. 65, pp. 8-11 (November 18-19, 1985), modified at pp. 104-105 (December 3, 1985) (hereinafter Tr., page (date)).

As a result of the stipulations reached by the parties, and approved by the Special Master, only four disputed issues remain to be decided: (i) whether the amount of accumulated departure for the period 1950-61 allegedly found by the Commission at its November 9, 1962 meeting is binding on the parties; (ii) whether negative departures that resulted from the completion of the McMillan training dike should be chargeable to New Mexico as a depletion by man's activities; (iii) whether changes in the contribution to the river in the reach above Alamogordo Dam should be included in an accounting of New

<sup>2</sup> As a result of those stipulations, the following issues in the Pre-Trial Order of October 10, 1985 were resolved: (i) Disputed Issues of Fact II.a.1. and II.b.1., which presented the question of the proper loss equation for channel loss, Artesia to Dam Site 3 for the 1954-83 period; (ii) Disputed Issues of Fact II.a.2. and II.b.2., viz. the proper area-capacity relations to be used to compute evaporation losses in McMillan and Avalon Reservoirs for the 1950-83 period; (iii) Disputed Issues of Fact II.a.4.(c) and II.b.4.(c), the issue of whether there were any depletions above the state line gauge which were assignable to Texas and (iv) Disputed Issues of Fact II.a.4(c) and II.b.4.(c), The Malaga Bend Salinity Alleviation Project.

In addition, New Mexico withdrew its objection to Texas' inclusion of evaporation losses from Tansill Lake as a depletion between the Carlsbad canal flume and the Carlsbad gauge in computing flood inflows, which resolved Disputed Issues of Fact II.a.3 and II.b.3.; and Texas withdrew its proposed Disputed Issue of Fact II.a.4.(d), viz., whether any depletions above the state line gauge were caused by the transfer of water rights downstream of Alamogordo Dam to areas above the dam.

Finally, the parties stipulated the amount of depletions caused by the McMillan training dike and the amount due to decreased irrigation above Alamogordo Dam, while reserving their legal contentions.



Mexico's obligation under the 1947 condition; and (iv) whether ground water pumping by Texas resulted in depletions of the river which should be credited to New Mexico's obligation.

These issues have been the subject of oral and written testimony and have been extensively briefed. On March 18, 1986 the Special Master issued a Draft Report which was the subject of oral argument on April 16.<sup>3</sup> Pursuant to the request of New Mexico at the April 16, 1985 Oral Argument, a further hearing was held on May 20-21, 1986 to consider the issue of the proper relief to be granted to Texas. Based on the foregoing, the following findings, conclusions and recommendations are embodied in this Report.

## II

### **NEGATIVE DEPARTURES FROM NEW MEXICO'S DELIVERY OBLIGATION DURING THE PERIOD 1950-1961**

Two issues are presented here: whether the Commission made a finding of fact as to the accumulated departures at state line from the 1947 condition for the period 1950-61, and if the Commission made such a finding, whether it is binding in this action. The Commission, at its November 9, 1962 meeting, explicitly adopted a report of the Engineering Advisory Committee as to the "accumulated departures" from the 1947 condition over the period 1950-61. Minutes of the Commission, November 9, 1962, Stip. Exh. 4(b) at pp. 256-257. The table set forth on those pages, labelled Exhibit #1, was adopted by unanimous vote of the Commission and states that the accumulated departures from the 1947 condition were found to be 53,300 acre-feet.

<sup>3</sup> In *Arizona v. California*, 373 U.S. 546 (1963), the Special Master, Simon H. Rifkind circulated a Draft Report to the parties and invited oral agreement on it. That precedent, which was thought useful, was followed here, also usefully.

Although there is no doubt that the Commission did make a finding that the negative departures from the 1947 condition equalled 53,300 acre-feet during the 1955-61 period, the question remains whether the parties are bound by the Commission's action. While admitting that the Commission did adopt Exhibit #1, as amended (Texas' Post-Trial Brief at 15-16), Texas argues that Article V(f) of the Compact makes any Commission finding of fact only *prima facie* evidence in this action. (Texas' Response to New Mexico's Legal Objections to Texas' Computed Departures for the 1950-61 Period, dated April 12, 1985.) Article V(f) states:

Findings of fact made by the Commission shall not be conclusive in any court, or before any agency or tribunal, but shall constitute *prima facie* evidence of the facts found.

If there was nothing else on the record, the Special Master would have discretion, pursuant to Article V(f), to decide whether to follow the Commission's decision. However, it is clear that any question about this matter was resolved by the Supreme Court in *Texas v. New Mexico*, 462 U.S. 554 (1983), wherein the Court instructed the Special Master on this issue. Because of its importance, the pertinent passage is quoted in full:

The crucial question that remains to be decided is the fourth: "[H]as New Mexico fulfilled her obligations under Article III(a) of the Pecos River Compact?" Pretrial Order 6. That question necessarily involves two subsidiary questions. First, under the proper definition of the "1947 condition," see *supra*, at 563, . . . , what is the difference between the quantity of water Texas could have expected to receive in each year and the quantity it actually received? *For the 1950-61 period, that difference has been determined by unanimous vote of the Commission; for 1962 to the present, determining the extent of the shortfall will require adjudicating disputes between the States as to the specific issues raised by the 1947 Study, the Review of Basic Data, and the Inflow-Outflow Manual.*

462 U.S. at 574-75 (emphasis added). By this language the Supreme Court has instructed the Special Master to determine the shortfall from "1962 to the present", but for the 1950-61 period, the determination of the total accumulated departure has been decided by the Commission and accepted by the Supreme Court. Given the Court's clear instruction, I hold that the accumulated negative departure, for the period 1950-61, from New Mexico's obligation under the 1947 condition to deliver water at state line, equals 53,300 acre-feet.<sup>4</sup>

### III NEGATIVE DEPARTURES DURING THE PERIOD 1962-1983

At the hearings on November 18-19 and December 3-4, 1985, Texas introduced into evidence Tex. Exh. 79, "Computation of Departures of State Line Flows of the Pecos River From the 1947 Condition During the 1950-83 Period, Revised November 26, 1985 as Stipulated by Texas and New Mexico on November 18, 1985." This exhibit, which incorporates all of the technical stipulations by the parties,<sup>5</sup> utilizes Tex. Exh. No. 68 to calculate departures from the 1947 condition during the period 1950-1983. In prior proceedings in this case, the Special Master "ordered that the Texas Figure 1 and Table 1, see, Tex. Exh. 68, pp. 3, 4 and the attachments hereto, shall be used in the determination of New Mexico departures from the obligation imposed by the Pecos River Compact Art. III(a)." Special Master's Report and Recommendation, at p. 13 (January 16, 1984). This Report was approved in its entirety by the Supreme Court in *Texas v. New Mexico*, 467 U.S. 1238 (1984). The

<sup>4</sup> This amount does not reflect adjustments allowed to New Mexico for McMillan training dike and for changes in use in the Upper Reach above Alamogordo Dam. Both subjects are dealt with hereafter.

<sup>5</sup> See, e.g., "Stipulation on Disputed Technical Issues", Order issued on July 8, 1985.

purpose of Tex. Exh. 79 was to determine, through the use of inflow-outflow and channel loss equations, the negative departures at state line from the 1947 condition that were attributable to man's activities. Based on the evidence contained in Tex. Exh. 79, I find that New Mexico had not met its Article III(a) obligation to Texas over the 1950-1983 period.

#### **A. "Man's Activities" and the 1947 condition.**

In commenting on the Draft Report, New Mexico took exception to the conclusion that Tex. Exh. 79, because it accounted for all natural depletions, could be utilized to determine the departures from the 1947 condition resulting from man's activities. New Mexico based its contention on the argument that Tex. Exh. 79 did not provide a sufficient evidentiary basis to establish that the negative departures were due to man's activities. In order to understand the New Mexico position and my reasons for rejecting it, a brief description of the nature and background of New Mexico's Article III(a) obligation may be helpful. The bargain struck in the Compact allowed New Mexico to retain the benefits of past development in the Pecos River Basin during the pre-Compact period. Sen. Doc. 109, Stip. Exh. 1 at 3-8. But in return, New Mexico had to forego increased uses by man after 1947. The mechanism for enforcing this bargain was the imposition on New Mexico of a duty to deliver annually to Texas, at the state line, the amount of water Texas would have received in 1947 if the water conditions of the given year had occurred in 1947 and if no increase in man-made uses had occurred in New Mexico. In other words, man-made uses were held to the 1947 level, and New Mexico's duty to supply water at the state line in any given year was determined by its baseline 1947 obligation. The technique for determining what the 1947 state-line flow would have been under the water conditions of some other year — 1980, to take an example — was called the inflow-outflow method. This methodology, consisting of elaborate correlations between observed data on which statistical projections were

based, presented difficult factual issues in the early stages of this case.<sup>6</sup> Judge Breitenstein concluded that the prescriptions in Art. II(f) and (g) of the Compact, which adopted the pre-Compact work of the Engineering Advisory Committee found in S. Doc. 109, were unworkable and, after ruling on certain disputed technical issues, directed that Tex. Exh. 68 be used to determine the simulated 1947 flow that would have occurred each year during the period 1962-1983 if there had been no increased depletions by New Mexico from man's activities. These inflow-outflow equations determine New Mexico's obligations under Art. III(a), because the difference between the numerical values appearing in Texas Exh. 68, the "1947 Condition" values, and the measured flow at the state line would presumptively be due to man's activities in New Mexico.

The further technical issues that arose thereafter were resolved, primarily by agreement, and Tex. Exh. 68 was incorporated into Tex. Exh. 73 and finally into Tex. Exh. 79. The purpose of these exhibits is clear. They tell the Court the amount of water that would have come down the river to the state line in 1947 if the same flow conditions had obtained then as did obtain in the year in question, corrected for non-man made depletions, and if New Mexico had not increased its man-made depletions.

At the Hearing on Relief and Remedy, May 20-21, 1986, requested by New Mexico during the Oral Argument on the Draft Report, New Mexico again advanced the contention that Tex. Exh. 79 does not provide a factual predicate for the presumption that the accumulated negative departures from the 1947 condition, presented in Table 2 of the exhibit, are a result of man's activities. *See*, Tr. 239-241 (5/20/86). To clarify the meaning of Tex. Exh. 79, Texas presented the testimony of Dr. V. R. Krishna Murthy, who is the principal author of both Tex. Exh. 68 and 79 and head of the team which prepared them.

<sup>6</sup> The Court describes the inflow-outflow methodology in *Texas v. New Mexico*, 462 U.S. 554, 572 (1983).



(Tr. 312 (5/21/86)). Dr. Murthy's testimony made it clear that the procedures followed in Tex. Exh. 79 accounted for all non-manmade depletions so that any residual departure was, by force of logic, the result of man's activities. (*Id.* at 313-315 (5/21/86)). Nothing in the New Mexico cross examination of Dr. Murthy or in the rebuttal testimony of Mr. Carl Slingerland convinced me to the contrary. Dr. Murthy's testimony was credible, consistent with the view of my technical consultant, and I accept it.

### **B. Allocation of the Burden of Proof.**

The testimony at the Hearing on Relief and Remedy confirmed the position taken in the Draft Report that once the technical issues were resolved so that Tex. Exh. 68 could be utilized, the negative departures indicated by Tex. Exh. 73, and its successor Tex. Exh. 79, were necessarily due to increased man-made depletions. Since Tex. Exh. 79 accounted for all natural depletions, New Mexico had the burden of showing that man's activities did not account for the departures. New Mexico introduced no evidence to refute the technical conclusion that the negative departures shown in Table 2 of Tex. Exh. 79 were not the result of man's activities in New Mexico and stipulated to the technical accuracy of Tex. Exh. 79. Since New Mexico offered no evidence on those issues, she failed to discharge the burden of going forward and, accordingly, the burden of persuasion is not in issue.

New Mexico contends that, as a legal matter, this allocation of the burden of proof is in error. I am unpersuaded. This case was tried, from the beginning, on the basis of the fundamental assumption of the Compact, namely, that the 1947 flow of the river could be reconstructed by hydrologic equations, that such reconstruction would account for man's uses of the river as of 1947 and that any reduction of flow from the 1947 condition should be attributed to increased man-made uses or to "encroachment of salt cedars . . . or deterioration of

the channel of the stream." Art. II(e) Pecos River Compact. It is both logically correct and, at this stage of these proceedings, practically necessary to hold that once Tex. Exh. 79 was agreed to, the departures shown therein constitute New Mexico's shortfall in the required deliveries under Article III(a) unless New Mexico can show otherwise. On the technical side she has not done so. On the legal side, she has shown that certain departures ought not to be charged to her, not because Tex. Exh. 79 is wrong or that the burden of proof has been misplaced but because under the law, she is not chargeable for the increased departures even though they are man-made.

In summary, the evidence is clear that the equations found in Tex. Exh. 79 account for *all* natural (*i.e.*, non-manmade) losses, such as losses resulting from phreatophytes, evaporation and channel conditions. *See, e.g.*, Tex. Exh. 79, Appendix B, "Computation of Flood Inflows Artesia to Carlsbad Reach", especially page B-3. Since these equations account for all non-manmade depletions, the only logical conclusion that can be reached is that the remaining departures resulted from other than natural causes.

Table 2 of Tex. Exh. 79 lists New Mexico's departures from its state-line 1947 obligation. The amount of negative departures caused by man's activities in New Mexico is shown in Column (7) of Table 2 for the 1962-1983 period to be 372,200 acre-feet. Therefore, except as modified in Sections IV-VI below, which deal with New Mexico's contentions that a portion of the accumulated departures should not be charged to New Mexico, I find the negative accumulated departure during the 1962-83 period to be 372,200 acre-feet.



## IV

**NEGATIVE DEPARTURES FROM NEW MEXICO'S  
DELIVERY OBLIGATION RESULTING FROM THE  
CONSTRUCTION OF MCMILLAN RESERVOIR  
TRAINING DIKE**

The issues here concern the diminished outflow from McMillan Reservoir caused by the construction therein of a training dike and whether New Mexico should be charged with any resulting negative departures from the 1947 condition. The reservoir was constructed in 1893 and has a long history of leakage. *See generally* S. Doc. 109, Stip. Exh. 1. In the water year 1941-42, large flood flows significantly increased that leakage, the effect of which was to increase the flow of the river at the state line. This increased flow was reflected in the 1947 condition. In 1951, the Commission unanimously approved a request to federal authorities to study the feasibility of "Rehabilitation of Lake McMillan by methods which will reduce seepage from that reservoir." Minutes of the Commission, November 9, 1962, Stip. Exh. 4(b) at 49-50. In 1954 a training dike was constructed that did reduce seepage and consequently decreased the flow from the 1947 condition. The question is, should New Mexico be charged for the depletion, and if not, what is the amount of salvage to be credited to her account.

In essence, New Mexico contends that the Pecos River Commission determined in its 1961 and 1962 Meetings that any departures in state-line flows from the 1947 condition caused by the McMillan dike would not be chargeable to New Mexico as a depletion by man's activities. *See* New Mexico's Memorandum on Consistency of Procedures and the McMillan Dike Adjustment to State Line Departures, at p. 3, dated November 14, 1985; New Mexico's Post-Hearing Brief, pp. 21-26, dated February 11, 1986. Texas, on the other hand, argues that a Commission action at its November 9, 1962 meeting demonstrates that there was no such determination. Thus, any depar-

tures at state line resulting from increased capacity at Lake McMillan should be chargeable to New Mexico as depletions caused by man's activities. See Texas Post-Trial Brief at pp. 13-18, dated February 11, 1986.

Given the parties' contentions, the starting point of the inquiry must be the Commissioners' Minutes for the meetings held on January 31, 1961 and November 9, 1962. In the 1961 meeting, a Joint Memorandum of the Commissioners and the Engineering Advisory Committee, dated August 23, 1960, was "approved, ratified and adopted by the Commission" (Stip. Exh. 4(b) at 233). The Commissioners describe the Lake McMillan problem this way:

There was quite a sudden change after the unprecedented flood flows of 1941 and '42. Those flood flows removed from the east side of the reservoir near the dam materials further exposing fractures and caverns which exist in the formation along that reach of the reservoir, thereby materially increasing the seepage from the reservoir. In the mid-1950s the Interstate Stream Commission of New Mexico caused a dike to be constructed along that lower reach of the reservoir to prevent water from entering the fissures and caverns. This dike had been fairly effective and has resulted in a material reduction in the leakage from the reservoir. It is not known how much of the water lost from the reservoir, regardless of its amount, has been beneficially used within the State of New Mexico, and how much of it has crossed the state line. The question is, should the actual leakage that was taking place under 1947 conditions be used by the Engineering Advisory Committee in defining the 1947 conditions or should present conditions be used, or should the leakage that was occurring prior to the flood of 1941 and 1942 be used.

The Commissioners recognize that morally New Mexico should not be penalized for an unusual act of nature such as occurred in 1941. The Commissioners do not know how much water is involved. It might be a relatively small amount; nevertheless a principle is involved. The Commissioners believe that under the Compact the problem can be

handled in one of two ways. Under that section of the Compact which provides that New Mexico can take steps to replace the loss of effective reservoir capacity it could be considered that the building of the dike in the middle 1950s was for the purpose of bringing back into being some of the capacity of Lake McMillan, the effectiveness of which was being lost because of the leakage. Another way to handle the situation would be to use the relationship between stage of the reservoir and discharge of Major Johnson Springs that was originally used by the Engineering Advisory Committee, in which case the inflow-outflow studies would indicate a depletion at the state line to the extent that leakage from the reservoir that was actually taking place in 1947 now has been reduced by the dike. Since under the definition of the Compact such a depletion could not be termed depletion by man's activities, the effect on New Mexico by the finding of such a depletion would be nil.

The Commissioners recommend that the subcommittee [this refers to the Subcommittee on Inflow-Outflow] will employ the same curve or relationship for McMillan leakage as that appearing in the Engineering Advisory Committee Report contained in Senate Document 109-81st Congress 1st Session.

*Id.* at 238-39.

Although not free from ambiguity, I construe this passage in the Joint Memorandum, which was approved, ratified and adopted by the Commission at its January 31, 1961 meeting, to decide the following issue relating to the McMillan Reservoir training dike: New Mexico was not to be obligated under the Compact to deliver to Texas water that leaked from Lake McMillan because of the 1941-42 flood. The Commissioners do not know and cannot find out how much more water leaked from the Reservoir after the flood than before, and similarly they do not know and cannot find out how much of the increased leakage is being used in New Mexico and how much is crossing the state line. However, the training dike is now in place and a practical solution is therefore at hand — in fact,

two possible solutions exist: (1) The training dike can be treated as a new facility permitted under Article IV(c)(i) of the Compact, or (2) the inflow-outflow studies (the routing studies) can be used to determine the difference, under the 1947 condition, between the outflow at the state line before the training dike was constructed and after. Either way, the principle that New Mexico should not be charged for reduced leakage from McMillan Reservoir is preserved. The Commissioners chose to use routing studies to solve the problem, but with the understanding that "the effect on New Mexico by the finding of such a depletion would be nil." *Id.* at 239.

These agreements were reached on August 22 and 23 of 1960. Apparently, the Inflow-Outflow Subcommittee went promptly to work, and by the time the formal meeting of the Commissioners was held on January 31, 1961, the Subcommittee and the Engineering Advisory Committee had in hand two routing studies relating to leakage and the effect of the dike on cumulative departures from the 1947 condition at the state line. One of the studies (*Id.* at 241) measured the leakage as part of the 1947 condition prior to construction of the training dike (*i.e.*, it measured the "1946-1952 leakage condition from Lake McMillan"). The other routing study (*Id.* at 242) measured the "1954-1958 leakage condition" after the dike was constructed in 1954. In other words, the latter study accounted for the effect of the training dike in determining the "1947 Condition State Line Flow", and the former did not. The Commission adopted both routing studies, not only for their methodology, but also as "findings of fact through 1959." (*Id.* at 247.) Thus by comparing the two studies, the credit to be given New Mexico for reduced leakage in McMillan could be determined.

If the record ended here, there would be no doubt that the Commission had agreed to credit New Mexico with the savings attributable to the training dike. However, Texas argues that the Commission, in effect, but without discussion, reversed itself

at its November 9, 1962 meeting. At that meeting, the Chairman of the Engineering Advisory Committee circulated, apparently without prior notice, a report setting forth for the years 1950-1961 the inflow-outflow numbers and the departures from the 1947 condition at the state line. This report is referred to in the Minutes as Exhibit #1. Following the tabulation of numbers, three paragraphs of text appear in Exhibit #1, the last of which deals with McMillan Reservoir. Because Texas relies heavily on Exhibit #1, and the actions of the Commission regarding it, the relevant portion is reproduced as a separate page of this Report in order for the Court to appreciate the format in which it appeared.



**MINUTES OF THE COMMISSION,  
NOVEMBER 9, 1962, STIP. EXH. 4(b) at p. 257  
[years 1950-56 omitted from the table]**

1	2	3	4	5	6	7	8
1957	182.8	229.7	48.7	77.3	92.9	-15.6	+35.6
1958	379.2	243.9	148.7	78.1	100.0*	-21.9*	+13.7
1959	191.6	251.2	54.6	84.0	103.6*	-19.6*	-5.9
1960	310.3	293.7	108.6	104.0	128.2	-24.2	-30.1
1961	211.6	237.8	57.9	73.7	96.9	-23.2	-53.3

\* The values in Columns 6 and 7 for the years 1958 and 1959 deviate slightly from those submitted to the Commission at its January 31, 1961 meeting. These small changes were brought about by minor arithmetic changes made in reviewing the flood inflow computation in these two years. It is recommended the above values be adopted as the official Commission values and replace those previously submitted.

The above table does not reflect adjustments for depletion, if any, which might have been caused below Carlsbad by pumping from the alluvium, with pumps constructed in 1947 or prior thereto.

The amounts set forth in the table below are departures caused by the training dike completed at McMillan Reservoir in 1954. In accordance with the action of the Pecos River Commission at its January 1961 meeting, these departures are not chargeable as a result of man's [sic] activities. The Engineering Advisory Committee has made no determination of what part, if any, of the remainder of the amount shown on Column 7 is so chargeable.

	<u>3-year Mean</u>	<u>Accumulation</u>
1955 .....	2.7	2.7
1956 .....	5.3	8.0
1957 .....	8.0	16.0
1958 .....	8.0	24.0
1959 .....	8.0	32.0
1960 .....	8.0	40.0
1961 .....	8.0	48.0

Exhibit #1 was not adopted as presented. The Minutes state:

Following a discussion concerning the second paragraph of the tabulation (which was to be referred to as Exhibit #1), it was agreed by the Engineering Advisory Committee that the paragraph should be deleted and the following inserted as the last sentence of the first paragraph, 'Otherwise the above findings are arrived at in the same manner as described in the January 1961 report of the Engineering Advisory Committee.'

*Id.* The Commission accepted the suggested amendment and adopted the exhibit as amended. *Id.*

Texas contends that the "second paragraph" is the one relating to McMillan Reservoir and that its deletion shows an intent by the Commission to rescind its 1961 decision not to charge New Mexico for reduced leakage from the reservoir. I agree with the first part of the proposition but not the second. It seems likely that the starred paragraph is a footnote, and that the "second paragraph," which was deleted by the amendment, was indeed the one dealing with McMillan Reservoir. The sentence added by the amendment to the "first paragraph" deals with methodology and fits the sense of that paragraph much better than it does the starred paragraph.

It does not follow, however, that by deleting the reference to McMillan Reservoir in Exhibit #1, the Commission intended to rescind its 1961 decision not to charge New Mexico for the training dike. A more plausible explanation for deletion of the second paragraph is that the table set forth at the end of that paragraph was derived from the January 30, 1961 Report of the Engineering Advisory Committee. See Minutes of the Commission, January 31, 1961, Exh. 4(b), especially the tables on pages 241-245. Apparently the only change the Commission made in Exhibit #1 was to substitute the source report for the deleted paragraph. Surely, if a reversal of policy was intended by the deletion of the second paragraph, some discussion would have appeared in the Minutes of the Commission, but none does.



Therefore, I conclude that the Commission agreed in 1961 not to charge New Mexico for the savings attributable to the training dike and that it did not change that decision in 1962 by an amendment to Exhibit #1 that merely substituted the underlying source material for the deleted paragraph.

At oral argument on the Draft Report Texas contended that the Commissioners did not have the legal authority to make this interpretation of the Compact — that the effect on depletions of the training dike presents a legal question of the meaning of “man’s activities” that only this Court can decide. Tr. 22-23 (4/16/86). As a more modest second line of argument, she suggested that at least the Commissioners could not, as an administrative agency, make binding decisions good beyond 1961 and 1962. Tr. 8 (4/16/86). As suggested *supra*, pp. 5 and 6 the Supreme Court seems to have disposed of this contention by ruling that Commission actions on delivery obligations under the compact are dispositive. *Texas v. New Mexico*, 462 U.S. at 574-75 (1983). But if, as Texas suggests, I have misunderstood this statement of the Court, I am nevertheless satisfied that the Compact contained a latent ambiguity when the terms “deplete by man’s activities” and “1947 condition” were applied to the effect on depletions of the training dike. That a latent ambiguity can be resolved by agreement between the parties to a contract is hornbook law. A. Corbin, *Corbin on Contracts* § 101 (1963). For this purpose there is no meaningful difference between an ambiguous contract and an ambiguous compact. If Texas’ characterization of the Commission as an administrative agency is accepted, the result is the same. An interpretation of a statute (as the Compact may be treated) by the agency entrusted to its administration is entitled to substantial deference. *United States v. City of Fulton*, 54 U.S.L.W. 4343, 4345 (U.S. Apr. 7, 1986), *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984), *United States v. Clark*, 454 U.S. 555, 565 (1982).

Having concluded that New Mexico should not be charged for reduced leakage from McMillan Reservoir, I must next decide how to measure the amount of water involved. For the period 1950-1961, the Commission itself made the decision. By adopting the routing studies at its 1961 and 1962 meetings, it effectively determined that New Mexico was to receive a credit of 48,000 acre-feet at the state line as a result of savings effected by the training dike.<sup>7</sup> See Minutes of the Commission, January 31, 1961, Stip. Exh. 4(b), at 240-245, 247-248. The decisions taken at the 1961 meeting were confirmed by the approval of the Minutes of that meeting at the next annual meeting on November 9, 1962. *Id.* at 252.

<sup>7</sup> The amount of water to be credited to New Mexico as a result of the McMillan training dike may be ascertained from the tables adopted by the Commission and set forth in the Commission Minutes. Stip. Exh. 4(b) at pp. 240-245. For the years 1955-1959, one compares column 15, "1947 Conditions State Line Flow", of the table "Values in Thousands of Acre Feet Texas and New Mexico State Line Outflows" ("with the 1946-1952 Leakage Condition from Lake McMillan"), (p. 241), with column 15, "1947 Conditions State Line Flow", of the similar table on p. 242 which is calculated "with [the] 1954-1958 Leakage Condition from Lake McMillan."

	1946-52 Leakage Condition	1954-1958 Leakage Condition (in 000)	Difference
1955 .....	119.2	116.5	2.7
1956 .....	126.0	120.7	5.3
1957 .....	92.9	84.9	8.0
1958 .....	100.6	92.6	8.0
1959 .....	104.2	96.2	8.0

For the years 1960 and 1961, one looks to p. 245 of the Minutes: "Difference in Outflow at New Mexico-Texas State Line Between 1946-52 and 1954-58 Leakage Conditions McMillan Reservoir" which provides the "Difference in Outflow" for alternative "Index Inflows". For the years 1960 and 1961, the index inflow was 293,700 and 237,800 respectively (Exh. #1, Stip. Exh. 4(b) at pp. 256-257). The index inflows for both 1960 and 1961 correlate with a difference in outflow of 8,000 acre-feet. Thus the total amount to be credited to New Mexico is 32,000 acre-feet for the period 1955 through 1959 plus 16,000 acre-feet for 1960 and 1961, for a total of 48,000 acre-feet.

However, I find nothing in the Minutes subsequent to 1962 reflecting an agreement by the Commissioners on a methodology for making the measurement and it is clear that the decisions of 1961 and 1962 were for the period 1950-1961 only, since the methodology was regarded at the time as being only an approximation. See Minutes of the Commission, January 31, 1961, Stip. Exh. 4(b) at 247. New Mexico nevertheless claims that the methodology adopted by the Commission in 1961 should be utilized to determine, for the post-1961 period, the amount of water saved by McMillan dike, New Mexico Post-Hearing Brief at p. 26. However, the written testimony submitted by Carl Slingerland on behalf of New Mexico recognizes that:

Given today's technology, the difference in state line flow between the two leakage conditions might be more accurately determined by developing a best fit equation for each condition and solving the equation for the desired index inflow. This latter procedure was used by Texas in preparing Texas Exhibit 74.

N. Mex. Exh. 122, Written Testimony of Carl Slingerland, "Procedures For Computing the Difference in State Line Flow Between the 1946-52 and the 1954-58 Leakage Conditions at Lake McMillan, Submitted by New Mexico Pursuant to Agreement Between the Parties December 4, 1985," dated December 16, 1985.

In her post-hearing brief and in oral argument on the Draft Report, New Mexico contends that the old methodology should be employed for the period 1962-1983, despite its inaccuracy, because of equitable estoppel. New Mexico asserts two kinds of equitable estoppel, estoppel by contract and estoppel by conduct. Neither doctrine precludes the use of accurate methods to determine the training dike depletions for the period 1962-1983. Estoppel depends upon a representation made by one party, detrimentally relied on by another. Texas made no representation as to future calculations of training dike depletions after the decisions, made on January 31, 1961 and

November 9, 1962, covering the period 1955-61. Both Commissioners recognized that the methodology was imperfect and subject to improvement. Minutes of the Commission, January 31, 1961, Stip. Exh. 4(b) at 243. Thus, not only did Texas *not* make representations as to future calculations, New Mexico had nothing on which to rely. Two key elements of estoppel are thus missing. After the unique agreement of 1961 and 1962, no other action on routing studies, inflow-outflow procedures or departures from the 1947 condition was ever taken by the Commission. The work of the Inflow-Outflow Subcommittee and the Engineering Advisory Committee was never completed, much less agreed to by the Commission. Hence, the task of the Special Master is to find the numerical values that apply to the 1962-83 period.

Since there is no Commission finding for the period 1962-1983 and since estoppel is inapplicable, the Special Master is free to use the most up-to-date methodology available to him, and that would appear to be, as recognized by New Mexico, the methodology advanced by Texas. See Tex. Exh. 90, Written Testimony of V.R. Krishna Murthy, "Increased Depletions (1955-1983) Resulting from the Construction of McMillan Training Dike, Submitted Pursuant to Agreement Announced on December 4, 1985," dated December 16, 1985. To determine the effect of the McMillan training dike, Dr. Murthy "performed a 1947 Condition river routing study, assuming that the McMillan Training Dike existed during the 1919-1946 routing period". Written Testimony of V.R. Krishna Murthy at p. 2. Utilizing the "revised gage height-capacity-area-leakage table" developed and presented in Tex. Exh. 74, Table 1, for the 1954-1958 McMillan Reservoir Leakage Condition, Dr. Murthy calculated the Revised Index Inflows and Index Outflows that appear on pp. 71-72 of Tex. Exh. 74. Dr. Murthy then estimated a least squares regression equation, incorporating all the stipulations entered into between Texas and New Mexico, to evaluate the effect of the McMillan training dike on state-line flows. Dr. Murthy found that the increased

depletions at state line resulting from the McMillan training dike equaled 27,600 acre-feet during the 1962-1983 period. *See* Written Testimony of V.R. Krishna Murthy at p. 4; Stipulation No. 4 between Texas and New Mexico, Tr. 10, modified at 104-105 (11/18/85, 12/3/85).

Therefore, I find that the departure from the 1947 condition chargeable to New Mexico must be reduced by 48,000 acre-feet for the 1955-1961 period, and by 27,600 acre-feet for the 1962-1983 period.

## V

### THE UPPER REACH ABOVE ALAMOGORDO DAM

The issue here is whether any change in depletion in the Upper Reach above Alamogordo Dam must be considered in an accounting of New Mexico's obligation to Texas under the Pecos River Compact. New Mexico contends that the "Compact requires adjustments for both Negative and Positive Depletions above Alamogordo Dam", New Mexico Post-Hearing Brief at 13-20. Texas, on the other hand, states that accounting for the effect of changes in depletions in the Upper Reach on state-line flows should include only "the years when depletions due to man's activities in that reach increased. . . ." Texas Post-Trial Brief at 9-10. In short, New Mexico nets out positive and negative changes, while Texas charges New Mexico for all increases in use, but gives no credit for decreases.

As a threshold matter, prior determinations in this case appear to support New Mexico's legal contention that both increases and decreases in depletion in the Upper Reach were an integral part of the accounting procedure in the 1948 inflow-outflow manual. *See, e.g.,* S. Doc. 109, Stip. Exh. 1 at 151-153. This is consistent with the provision of the Compact that allows New Mexico freedom to administer the Pecos River within its own boundaries. Article VIII states:



The provisions of this Compact shall not apply to, or interfere with, the right or power of either signatory state to regulate within its boundaries the appropriation, use and control of water, not inconsistent with its obligations under this Compact.

The only relevant limitation on New Mexico's ability to affect Pecos River flows is Article III(a) of the Compact, which prohibits New Mexico from depleting by man's activities the flow of the Pecos River *at the New Mexico-Texas state line* below an amount equivalent to that available to Texas under the 1947 condition. Analyzing these provisions of the Compact leads me to conclude that the *source* of contributions to the Pecos River is irrelevant to New Mexico's obligation, as long as that obligation is met. This was the view expressed in the Report of the Special Master to the Supreme Court, September 7, 1979: "The determining factor is the quantity of the flow at state line. The source of the flow is immaterial." *Id.* at 42 (adopted by the Court, *Texas v. New Mexico*, 446 U.S. 540 (1980)).

As stipulated by the parties (Stipulation No. 3 between Texas and New Mexico, Tr. 9 (11/18/85)), the number of acres in irrigation in the Upper Reach above Alamogordo Dam has decreased from 14,600 acres in 1951 to 11,250 acres in 1983, for an average decrease of 2,719 acres (N. Mex. Exh. 74). The effect of this decrease in irrigation would be, everything else being held constant, to increase the inflow of the Pecos River at Alamogordo Dam, which could have some measurable effect on the amount of water at state line. The intent of the Compact appears to be that this increased "contribution" to the river by New Mexico can be offset by depletion by man's activities of an equal amount of water from the river, said amounts always being measured at state line. See Articles III(a) and VIII of the Pecos River Compact. Texas cites no authority that convinces me to the contrary. Moreover, unless New Mexico is credited with contributions to the river resulting from decreased usage, she is deprived of one of the



principal means of making up her negative departures from the 1947 condition.

Having concluded that any accounting of New Mexico's obligation to Texas at state line must account for both increases and decreases in contribution from the Upper Reach, I must decide upon the method to be utilized in measuring the amount of water involved. This task has been made easier by the Stipulation entered into between the parties regarding both the change in irrigated acreage above Alamogordo Dam, and the streamflow depletion rate of that acreage. Stipulation No. 3 between Texas and New Mexico, Tr. 9 (11/18/85). In that Stipulation, the parties agreed that: (1) the number of acres in irrigation in the upper reach above Alamogordo has decreased from 14,600 acres in '951 to 11,250 acres in 1983, for an average decrease of 2,719 acres (N. Mex. Exh. 74); and (2) that "the stream flow depletion rate for the 1947 condition period is .74 acre-feet per acre; [and] the stream flow depletion rate for the period 1950-1983 is .88 acre-feet per acre". *Id.* It is clear that the effect of the first stipulation (*viz.*, a decrease in the number of acres irrigated in the reach above Alamogordo Dam) would, all other things being equal, increase the contribution to the river from the Upper Reach, while the second stipulation (*viz.*, the increase in the depletion rate from .74 to .88 acre-feet per acre) would, all other things being equal, decrease the contribution to the river from the Upper Reach. Thus, both of these stipulated facts must be taken into account in any accounting of New Mexico's obligation to Texas at state line.<sup>8</sup>

<sup>8</sup> These stipulations do impose some artificiality on the calculation. For example, the stipulation that the depletion rate for the 1947 condition is .74 acre feet per acre does ignore the fact that the rate varied over the 1919-1946 period as a result of various causes including different amounts of yearly precipitation. In other words, the stipulation imposes an "average" for the yearly depletion rate over the 1919-1946 period. This is also true for the .88 depletion rate for the 1950-1983 period. Nonetheless, the parties have *stipulated and agreed* to use the .74 and .88 depletion rates, no matter how artificial, and I am thus required to utilize these numbers in my calculation.

While I have accepted New Mexico's legal theory that both increases and decreases in uses above Alamogordo Dam must be taken into account in determining its state-line obligation, I find that New Mexico's proffered methodology for calculating this change in contribution to the Pecos River is inconsistent with its own legal theory. New Mexico does not charge herself with the increase in consumptive use from .74 acre-feet per acre to .88 acre-feet per acre. What New Mexico's calculation reflects is the discredited argument that the Compact protects all of New Mexico's uses, no matter the level of water consumption, that existed at the time that the two states entered into the Compact. This argument was rejected by the former Special Master (Report of Special Master on Obligation of New Mexico to Texas under the Pecos River Compact, September 7, 1979, at 2, 38-39 and 50 ("Special Master's Report (1979)"), and that Report was confirmed by the Supreme Court "in all respects". 446 U.S. 540 (1980). If I were to accept New Mexico's method of calculation, I would be "accept[ing] . . . the New Mexico position [that] protects New Mexico's rights but destroys Texas' rights". Special Master's Report (1979) at 38-39. The Supreme Court has rejected the protected use theory of New Mexico and that is the law of the case.

Although Texas disputed New Mexico's legal theory as to the proper accounting for changes in depletions in the Upper Reach, Texas did introduce into evidence two exhibits that calculated what the effect on New Mexico's state-line obligation would be if New Mexico's legal theory was adopted, a calculation that incorporated Stipulation No. 3. Tex. Exh. 82, "Written Testimony Pursuant to Stipulation 3(f) Between Texas and New Mexico on November 18, 1985" by Zack L. Dean, and Tex. Exh. 89, "Written Testimony of Zack L. Dean, Adjustment for Changes in Depletions Above Alamogordo Dam, Submitted Pursuant to Agreement Announced on December 4, 1985," dated December 16, 1985. On page 4 of

Tex. Exh. 89, Mr. Dean calculates the effect on New Mexico's state-line obligation of accounting for both increases and decreases in depletion in the Upper Reach, by incorporating the Stipulations into the inflow-outflow equations of Tex. Exh. 79. For the period 1950-1983, Mr. Dean calculates that the effect of the decreased acreage and the increase in stream flow depletion has decreased departures at state line chargeable to New Mexico by 6,800 acre-feet.<sup>9</sup> I accept his calculations.

Therefore, I find that the depletion chargeable to New Mexico during the 1950-1983 period must be reduced by 6,800 acre-feet to account for contributions to the river in the Upper Reach above Alamogordo Dam.

## VI

### THE EFFECT OF PUMPING IN TEXAS ON STATE-LINE DEPARTURES: CAPITAN AQUIFER

At the hearing on November 19, 1985, New Mexico claimed for the first time during the proceedings that oil and gas operations in the vicinity of Kermit, Texas, located some 100 miles from Carlsbad, caused depletions of the river at Carlsbad Springs in the amount of 93,250 acre-feet over the 1950-83 period ("Capitan Aquifer claim"). In support of this claim New Mexico offered the testimony of Ms. Deborah L. Hathaway, a hydrologist employed in the Office of the State Engineer of New Mexico. Ms. Hathaway holds a B.A. degree, an M.A. in secondary education from the University of New Mexico, and an M.S. in Civil Engineering in Hydrology and Water Resources from Colorado State University. Ms. Hathaway was accepted by Texas as an expert in hydrology, although her testimony was objected to on the ground that the

<sup>9</sup> This decrease in New Mexico's state-line obligation includes Stipulation No. 3(e) which states "the evaporation due to the operation of the Los Esteros Reservoir for the period 1980 through 1983 is 2,300 acre-feet. This amount will be added as a depletion chargeable to New Mexico for the 1950-1983 period for the reach above Alamogordo Dam." Tr. 9 (11/18/85).

claim was presented too late. While there was merit in Texas' objection, I admitted the testimony, because of the sovereign status of the party offering it, and granted Texas a recess of 14 days, until December 3, 1985, to prepare cross-examination.

In simplified terms, the theory of New Mexico's claim is that pumping in the Capitan Aquifer in Texas reduced the piezometric water level in the aquifer, causing the surface flow of the Pecos River at Carlsbad Springs to diminish and thus reducing the river's flow at the state line. Such reductions of flow should not, New Mexico contends, be charged against New Mexico under the Compact.

I conclude that the evidence is insufficient to support the claim. The Capitan Aquifer is a buried limestone reef in the shape of an inverted crescent running from a point west of the river at Carlsbad Springs, crossing the river and curving south, where it crosses the state line east of the river and continues to run southeast into Texas. ( See Fig. 3, N. Mex. Exh. 105. ) In the area critical to New Mexico's claim, east of the river in the vicinity of the Lea-Eddy County line in New Mexico, the reef is traversed by canyons which have been filled with rock substantially more impermeable than the surrounding limestone. In order for New Mexico's theory to hold, three geohydrological conditions must obtain:

(1) the contribution of water from the aquifer to the river at Carlsbad Springs, where the river crosses the aquifer, should have been reduced or reversed;

(2) water must be able to flow in the aquifer between the portion of the aquifer west of the canyon section and the portion east thereof;<sup>10</sup> and

(3) water must be able to flow between the portion of the Capitan aquifer east of the canyon area and the portion of that aquifer and adjacent aquifers further east in Texas, where the pumping occurs, a distance of some 100 miles from Carlsbad Springs.

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<sup>10</sup> This entire section of the aquifer is east of Carlsbad Springs.



If any one of these conditions remained unproved by New Mexico, the claim collapses, because there must be both communication throughout the aquifer and a force to divert the water through the aquifer from the river at Carlsbad to the area of pumping in Texas. I am not persuaded that the evidence establishes the existence of any of the conditions, much less all three. In the interest of brevity, only the second condition is discussed in detail.

As stated above, in the submarine canyon section of Capitan Aquifer, near the Lea-Eddy County line, the relatively permeable limestone reef is traversed by canyons that are filled with relatively impermeable rock. The major impermeable (or in the terminology of geohydrology, low transmissivity) submarine canyon is named West Laguna. If groundwater cannot move, in any significant degree, between that portion of the aquifer east of the West Laguna submarine canyon (toward Texas) and that west of West Laguna (toward the river at Carlsbad), then pumping in Texas would not affect the flow of the river at Carlsbad. The evidence does not support a finding of a degree of transmissivity that would allow such flow across the submarine canyon zone. Ms. Hathaway, who is not a geologist, relied heavily on a Ph.D. thesis by William Hiss (N. Mex. Exh. 105) for the geologic foundations of her testimony. But N. Mex. Exh. 105 does not support a conclusion that transmissivity of sufficient magnitude exists through the West Laguna canyon. The Hiss thesis repeatedly states that there is minimal transmissivity in this area. N. Mex. Exh. 105 at 197, 272 and 348. Moreover, no correlation exists between the observation wells lying east of the West Laguna canyon and those west thereof, indicating lack of meaningful hydraulic connection. N. Mex. Exh. 105 at 195, Figure 25.

Similar deficiencies in proof are present for both Conditions 1 and 3. As to Condition 1, the problem is not transmissivity but the absence of a change in the driving force that would divert water from the Pecos River to the Capitan

Aquifer. Ms. Hathaway herself testified that water levels in this area are flat (Tr. 53 (11/19/85)), and N. Mex. Exh. 105 (Fig. 23) confirms this fact. No change in the gradient over time was shown. If anything, the evidence suggests an increase in flow from the aquifer to the river. N. Mex. Exh. 105, Fig. 24, gives hydrographs of observation wells in the section of the aquifer between the river and West Laguna canyon. No decline in the water table is shown. In fact, N. Mex. Exh. 105 at p. 195 shows a cumulative increase in the piezometric water levels in observation wells 3, 4, 5 and 6.

New Mexico relied on its Exhibit 95 to establish a change in gradient. But this exhibit is derived from Figs. 22 and 23 of the Hiss thesis (N. Mex. Exh. 105), which do not show a draw down in the relevant area (Pecos River to West Laguna submarine canyon). Thus, while there may be a hydraulic connection between the river and the aquifer in the area west of the submarine canyons, there is insufficient evidence of a change in head to permit gravity to divert water from the river.

Finally, the evidence of movement of water in the aquifer in Texas owing to oil and gas (and other) operations is unsatisfactory. The area is large, the geology is sketchy at best, and the information about the *net* amount of water withdrawn in Texas is inadequate because of the lack of data.<sup>11</sup>

In summary, New Mexico had the burden of establishing three links in a chain of proof and failed to establish any of them. The Capitan Aquifer claim must therefore be denied.

<sup>11</sup> Secondary recovery operations in Texas—on the shelf at the edges of the aquifer—could have resulted in some draw down of the aquifer in Texas, but injection of salt water produced from oil wells could have offset the draw down. The data on both withdrawal and injection are incomplete. Tr. 65-67 (11/19/85).



**VII****CLAIMS OF THE UNITED STATES**

The United States intervened in this case but advised the Special Master that it would not participate actively in the case, Letter from Rex E. Lee, Solicitor General of the United States, to Special Master Jean S. Breitenstein, dated January 22, 1982, and it has not done so. A general adjudication of water rights in the Pecos Basin in New Mexico is now under way in a New Mexico tribunal and the United States is a party in that action. Accordingly, I recommend that the Court dismiss the United States without prejudice.

**VIII****REMEDY**

By resolving the foregoing issues of mixed law and fact, by giving effect to the Commission's findings for the period 1950-1961 as directed by the Court, and by adopting the many useful stipulations of the parties, I am in a position to determine the negative departure from the 1947 condition resulting from man's activities and chargeable to New Mexico, and I find the total amount for the full period, 1950-1983, to be 340,100 acre-feet of water.

# **NEGATIVE DEPARTURES FROM THE 1947 CONDITION CHARGEABLE TO NEW MEXICO**

## **TOTAL NEGATIVE DEPARTURES:**

1950-61.....	53,300 acre-feet (Section II)
1962-83.....	372,200 acre-feet (Section III)

## **MINUS THE AMOUNTS NOT CHARGEABLE TO NEW MEXICO:**

McMillan Dike (1955-1961).....	48,000 acre-feet (Section IV)
McMillan Dike (1962-1983).....	27,600 acre-feet (Section IV)
Upper Reach above Alama- gordo Dam (1950-1983).....	6,800 acre-feet (Section V)
Capitan Aquifer (1950-1983).....	0 (Section VI)
Malaga Bend Salinity Alleva- tion Project (Stip. No. 2, November 18, 1985) .....	<u>3,000</u> acre-feet
Net Amount Chargeable to New Mexico (1950-1983)...	340,100 acre-feet

The question remaining is how this amount of water should be repaid. The average flow of the river at state line for the period 1950-1983 was only 75,500 acre-feet.<sup>12</sup> Obviously it will take time to repay the debt if repayment is made with water. An alternative solution might be repayment in money. It is quite possible that both Texas and New Mexico would be better off with a monetary solution than with repayment in kind. The suggestion was made to counsel but institutional difficulties were noted: Would a legislature appropriate the funds? How could those who suffered and moved away be compensated?

<sup>12</sup> Tex. Exh. 79, Table 2. Moreover, the flow is highly variable. During the same period the flow ranged from a maximum of 325,200 acre feet in 1966 to a minimum of 12,100 acre feet in 1977. *Id.*

In any event, I do not feel free to recommend that the Court impose a monetary solution, for I can find no explicit basis for such a remedy in the Compact. The Compact appears to contemplate delivery of water; being a law of the United States, *Texas v. New Mexico*, 462 U.S. 554 (1983), the Court may not order relief inconsistent with its terms. *Id.* at 564. Hence the relief to be recommended, at least by a Special Master, ought to be specified in quantities of water.

**A. New Mexico's Obligation to Texas under the Pecos River Compact.**

The Draft Report circulated to the parties on March 18, 1986 contained the following findings and recommendations:

1. New Mexico failed to meet its Article III(a) obligation under the Pecos River Compact;
2. New Mexico should be allowed ten years in which to satisfy its obligation to deliver the 340,100 acre feet of water due, subject to a "annual minimum delivery" obligation of 34,010 acre feet at the state line;
3. To prevent procrastination by New Mexico, water interest should be charged on the undelivered balance of water due in any year in which New Mexico does not meet its annual minimum delivery obligation ("deficit amount").<sup>13</sup>

Thus, according to the Draft Report, if New Mexico at the end of any year after the decree took effect failed to satisfy the annual minimum delivery obligation, at the end of the next year the amount of water owing would consist of three components:

1. The Article III(a) obligation;

<sup>13</sup> The suggested rate of water interest was equal to the yield on one year Treasury bills on the date that New Mexico's delivery deficit is determined. This rate was thought to approximate the opportunity cost to Texas of late delivery of water by New Mexico.

2. The principal unpaid amount, a component of which is the current year's "annual minimum delivery."

3. The deficit amount for the previous year, plus one year's water interest.

In each year, the Article III(a) obligation would have to be satisfied first, then that year's minimum delivery obligation, and then the deficit amount plus accrued interest.<sup>14</sup>

At oral argument on the Draft Report held on April 16, 1986, New Mexico moved for a hearing on the questions of New Mexico's ability to meet these obligations and the economic hardship they would impose. The hearing was held on May 20 and 21, 1986, at which New Mexico made the following four points:

1. Any allocation of water in New Mexico to maintain flows at the state line *must* be governed by the rule of prior appropriation, which is adopted in Article IX of the Pecos River Compact and in Article XVI of the New Mexico Constitution. Tr. 14-15 (5/20/86);

2. The *only* solution available to New Mexico, therefore, is to shut down pumpage of ground water of junior water rights holders, primarily in the Roswell Basin. *See e.g.* Tr. 34-45 (5/20/86);

3. Because of the geohydrology of the aquifers and the river, it would be impossible to meet the Master's proposed decree in the early years, even if all ground water users in the Roswell Basin were totally closed down. *See, e.g.*, Tr. 12 (5/20/86); and

4. Of the water that would be made available to the Pecos River as a result of the termination of ground water

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<sup>14</sup> If New Mexico did not make up the deficit in the year subsequent to which it was incurred, then the deficit would carry over to the next year and water interest (at the rate originally determined) on that amount would accumulate at a compound rate until that deficit plus interest was paid in full.

pumping in the Roswell Basin, only 34% would reach state line. Tr. 67-68 (5/20/86); N. Mex. Exh. 125.

New Mexico also presented evidence on the economic loss that would be incurred if she were required to shut down pumpage in the Roswell Basin. New Mexico estimated the present value of its maximum "primary" economic loss to be \$151,781,678, with a maximum "secondary" loss of \$180,081,000; these losses were assumed to occur over a period of 20 years. N. Mex. Exh. 136, Table 26, p. 31.

With regard to the secondary impacts, I am quite skeptical of their validity, a skepticism that appeared to be shared to some extent by New Mexico's economic expert, Dr. Snyder, *see* Tr. 197-198 (5/20/86), as well as by Texas' economic expert, Mr. Wright, *see* Tr. 376-379 (5/20/86). As to the relative magnitude of the primary loss to New Mexico, Texas introduced Exhibit 101, entitled "Personal Income by Major Source and Earnings by Major Industry", a table developed by the Bureau of Economic Analysis specifically related to Chaves and Eddy Counties, New Mexico, which comprise the Roswell Basin. As Mr. Wright noted in his testimony, the economic loss to New Mexico for one of the scenarios presented, *i.e.*, a delivery to Texas of 20,000 acre-feet per year (N. Mex. Exh. 136, Table 26, p. 31) is equal to less than one percent of non-farm income for the Roswell Basin. Tr. 383-384 (5/21/86). While New Mexico will undoubtedly suffer some economic loss from being required to deliver water to Texas, the amount is too speculative to quantify.

As to New Mexico's physical ability to deliver water to Texas, Proposition 1 is true but not dispositive and Proposition 2 is incorrect. While it is clear that prior appropriation governs any *curtailment* of water rights by New Mexico to meet its Article III(a) and repayment obligation under the proposed relief, curtailment is not the only method of internal ordering open to New Mexico. As disclosed in the testimony of the New Mexico State Engineer on cross-examination, it is possible for



New Mexico to purchase or condemn water rights and then (i) pump the water directly into the river in the case of ground water rights or (ii) curtail diversions in case of surface water rights. See Testimony of Stephen E. Reynolds, Tr. 56-60 (5/20/86).<sup>15</sup> As further noted in the testimony of Carl L. Slingerland, a consulting engineer for the New Mexico Interstate Stream Commission, the Carlsbad Irrigation District alone diverted during the 1950-1983 period an average of 60,000 acre feet per year from the river. Tr. 86 (5/20/86). Thus, it is clear that New Mexico has other means of meeting a delivery obligation than curtailment of pumpage by junior rights holders in the Roswell Basin. Accordingly, New Mexico's Proposition 3 is beside the point.

With regard to Proposition 4, that only 34% of the water returned to the river in the Roswell Basin would reach state line, it was clear from both Mr. Slingerland's testimony, see Tr. 80-86 (5/20/86), and the rebuttal testimony of Dr. Murthy, see Tr. 352-363 (5/21/86) and Tex. Exh. 96, 97, and 98, that the depletion in the river results not only from natural channel losses, but also from diversions by senior surface water rights holders located in the Carlsbad to state line reach of the River. Given New Mexico's obligations to Texas under the Pecos River Compact, New Mexico cannot throw up its hands and state that because of the rule of prior appropriation it is impossible to provide the necessary water to Texas. Purchase or

<sup>15</sup> In *Kaiser Steel Corporation v. W. S. Ranch Company*, 81 N.M. 414, 467 P.2d 986, 992 (1970), the New Mexico Supreme Court stated that "a *jus publicum* [is] present in water. . . ." In *Kaiser*, a case involving the right of a private corporation to condemn property to secure water for business use, the court emphasized the unique public policy position of water in New Mexico and stated that "only by invoking the power of eminent domain can the state distribute its own waters as its public policy requires." *Id.* at 989-90. (Citing *Threlkeld v. Third Judicial District Court*, 36 N.M. 350, 15 P.2d 671 (1932)). New Mexico law clearly allows transfers of water rights as well as a change in the purpose for which water was originally appropriated. See, e.g. N.M. Stat., §§ 75-5-21 to 75-5-25. New Mexico law, therefore, appears to provide a sufficient basis for the type of internal ordering recognized by the State Engineer.

condemnation of these surface rights in the Carlsbad to state line reach would alleviate the problem of channel losses and would obviate New Mexico's having to shut down all the irrigation in the Roswell Basin. A combination of strategies could reduce the burden on New Mexico of compliance. In the early years, New Mexico could rent water in the Carlsbad area, resorting in the later years to increased flows resulting from reduced pumping.

Therefore, it is my recommendation that the Court enjoin New Mexico and the appropriate officials therein (i) to meet her Article III(a) obligation under the Pecos River Compact, (ii) to deliver to Texas the amount of 340,100 acre feet over a period of ten years, with an annual minimum delivery obligation each year of 34,010 acre feet, and (iii) if New Mexico does not make a good faith attempt to meet the minimum annual delivery obligation of 34,010 acre-feet specified above, require New Mexico to pay water interest to Texas on the balance of the amount of water owed. In order for both New Mexico and Texas to make the necessary preparations for delivery of the water, I recommend that New Mexico be given a three-year grace period to commence performance of the annual minimum delivery obligation, provided that during that three-year period she demonstrates her good faith by meeting for this three-year period the Article III(a) obligation. As admitted by New Mexico, *see, e.g., N. Mex. Exh. 134, Table 1A*, the Article III(a) obligation requires New Mexico to increase its delivery to Texas by approximately 10,000 acre feet per year.

As for the payment of water interest, a balance must be struck between the opportunity costs that Texas has incurred from New Mexico's failure to deliver water during 1950-1983 period, and will incur because it will receive water from New Mexico over a ten year period (1989-1999) rather than all at once, and the cost to New Mexico of having to increase her deliveries to Texas by 34,010 acre feet per year under the decree. To balance these equities I propose the following:

Water interest will be due on the amount owed by New Mexico only if New Mexico fails to act in good faith in meeting the terms of the decree. For purposes of the decree, good faith will be defined as meeting at least 80% of the aggregate minimum delivery requirement for the first five years, and the annual minimum delivery obligation each year thereafter.<sup>16</sup> Once it is determined that New Mexico has not acted in "good faith", i.e., has not met 80% of its aggregate delivery obligation by the fifth year of the decree, water interest will begin to run on the amount that New Mexico has fallen short as well as on the 34,010 acre feet per year that she must deliver over the last five years of the decree. For example, if in year five of the decree it is determined that New Mexico has not met her aggregate minimum delivery obligation by an amount of 50,000 acre feet, then in the next year not only will New Mexico have to make up that 50,000 acre-feet in addition to delivering the 34,010 acre feet owed under the decree, she will also have to pay interest on the total amount due in that year, that is interest on the 84,010 acre feet.<sup>17</sup> Interest will continue to accumulate thereafter on all amounts that remain undelivered under the decree whether or not New Mexico meets her 80% obligation in subsequent years.

<sup>16</sup> The basis for choosing 80% as the good faith standard is the following; the mean index inflow over the 1950-1983 period was 194,170 acre-feet with a standard deviation around the mean of 42,170 acre-feet. Thus, the percentage deviation from the average three year index inflow over the 1950-1983 period equals approximately 21.7%. Because of this variation around the average index inflows, which results both from natural causes and the three year method of averaging required by the Compact, it is quite possible that New Mexico may be acting in good faith in attempting to add more water to the river to meet her obligation but will fall short through no fault of her own. Therefore, if New Mexico meets 80% of its obligation during the first five years and each year thereafter a rebuttable presumption should exist that she acted in good faith.

<sup>17</sup> As noted in note 13 of this Report, *supra*, the interest rate should equal the yield on one year treasury bills on the date that New Mexico's delivery obligation is found to be in deficit. I believe this rate approximates the opportunity cost to Texas of late delivery of any water by New Mexico. This interest rate would have to be determined and calculated for each year remaining under the decree for the balance of water owed.

Although I recognize that charging interest to New Mexico will impose a significant burden on her, without an interest penalty, New Mexico will have no incentive to fulfill the terms of the decree other than Texas' instituting another original action in this Court. Given the lengthy fact finding process of such a suit as evidenced by the present action, another original action, or an action to enforce this decree, by Texas would not provide enough incentive for New Mexico to meet its obligation to deliver water to Texas at state line according to the terms of the decree.

#### **B. Retrospective Relief Under the Compact.**

At the May 21, 1986 Hearing on remedies, New Mexico asserted, for the first time in 12 years of proceedings, that the Compact did not authorize relief for past defaults in meeting the Article III(a) delivery obligation. Succinctly stated, New Mexico contended that the Compact contemplated prospective relief only but not repayment of prior under-deliveries. In ordinary litigation, such a contention, which should have been advanced at the pleading stage, would be summarily dismissed, but given the sovereign status of the parties and the stakes involved, New Mexico was given the opportunity to brief the question and did so. Texas responded, and the issue is ripe for decision. In my view, wholly apart from the procedural irregularity, New Mexico's position has no merit.

Her argument, simply stated, is that the Compact, by its express terms, does not contemplate accumulation of debits and credits and repayment to Texas of accumulated negative departures. Instead, the only relief Texas is entitled to is prospective relief, *i.e.*, if New Mexico fails to deliver at state line in a particular year an amount of water that satisfies the Article III(a) obligation, then New Mexico would be instructed to increase the flow at state line in future years by an amount that would cause New Mexico to meet the obligation. In addition to this recently proffered interpretation of the Compact, New Mexico also argues "there is nothing in the pleadings and



papers filed in this case to indicate that Texas seeks payment of past accumulated departures and state line deliveries." New Mexico's Legal Memorandum on Relief under the Pecos River Compact, at 14.

The Court itself has rejected both propositions, at least implicitly, in *Texas v. New Mexico*, 462 U.S. 554 (1983). New Mexico, in the exceptions that it filed to the Special Master's 1982 Report, argued that "this Court may do nothing more than review official actions of the Pecos River Commission, on the deferential model of judicial review of administrative action by a federal agency, and that this case should be dismissed if [the Court] find[s] either that there is no Commission action to review or that the actions the Commission has taken were not arbitrary or capricious." 462 U.S. 566-567. In rejecting this view the Court clearly stated that New Mexico's position would leave Texas with no remedy: "Under New Mexico's interpretation, this court would be powerless to grant Texas relief on its claim under the Compact." 462 U.S. at 569. Noting its equitable power to apportion interstate streams, the Court clearly recognized Texas' right to seek judicial relief under the Compact. 462 U.S. at 567. It would be inconsistent with this view to adopt New Mexico's new argument that Texas, which is a party to what is in effect a contract between two states (Special Master's Report at 12 (May 6, 1977) *cf.* *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951) (substantive law of contracts applies to interstate compacts)), is not entitled to the normal remedy that applies in contract cases, namely, damages for past wrongs. Moreover, New Mexico's position as to remedy cannot be reconciled with the Court's order to the Special Master to determine for the period 1962 to the present New Mexico's negative departures from its 1947 condition obligation. 462 U.S. at 575. No purpose would be served in spending



considerable resources to determine the amount of past shortfalls if no remedy is available for the deficiency.<sup>18</sup>

Another reason for rejecting New Mexico's position is that the sole relief she proposes, namely adjustments in New Mexico water consumption to meet future delivery obligations, is illusory. Take the following example. Assume that the Commission, or some other entity designated by the Court, found that in a particular year, say 1988, New Mexico had not met its Art. III(a) obligation.<sup>19</sup> Also assume that this shortfall equaled ten thousand acre-feet. Pursuant to this finding the entity responsible for determining negative departures would order New Mexico to reduce water consumption in order to deliver ten thousand acre-feet more water in 1989.<sup>20</sup> However, there is no way to determine New Mexico's 1989 delivery obligation under the 1947 condition, until the actual flood inflows have been measured, adjusted for natural depletions, and averaged as required by Article VI(b) of the Compact. If a drought occurred in 1989, New Mexico's 1947 state-line obligation would be reduced; if 1989 were a very wet year, it would be increased. There is no constant relationship between the Article

<sup>18</sup> Even New Mexico, at one time, conceded that repayment was a remedy contemplated by the Compact. In her fifth affirmative defense to the Texas Complaint, New Mexico responded to Texas' request for retrospective relief not by stating that this relief is unavailable under the Compact but by arguing that it is "barred by laches." Answer of the State of New Mexico at 4. In addition, New Mexico has conducted itself throughout this litigation as if she believed that the Court could order payback of accumulated deficits. *See, e.g.*, Tr. 94 (5/16/86). Even if Texas' Complaint is read as not seeking retrospective relief, Texas would be allowed to amend its Complaint to conform with the evidence presented in this litigation. *Cf. Fed. R. Civ. P. 15(b).*

<sup>19</sup> Remember that the 1947 Condition obligation is not a specific number that can be assessed prior to the year in question but only a standard that may be quantified by putting into the inflow-outflow equation the adjusted three year average historical flood inflows.

<sup>20</sup> This additional delivery is made, not on a theory that it is a payback, but on New Mexico's theory that past negative departures require reduced consumption to bring New Mexico up to the 1947 Condition in the future.

III(a) obligation in one year and the Article III(a) obligation in the next year. The determination of a negative departure in 1988 of 10,000 acre-feet causing an order to issue for increased flows in 1989 by that amount may cause more or less water to be delivered than is required to meet the 1947 condition. In effect, the 1947 condition is a moving target, changing from year to year depending upon the amount of flood inflows into the Pecos River. Thus, if the Court were to adopt New Mexico's proposal that only prospective relief is allowed under the Compact, it is possible that Texas would never receive any makeup water, although negative departures occurred in a number of years. New Mexico could thus deprive Texas of its equitable share of Pecos River water apportioned by the Compact, because the amount that Texas is owed prospectively can only be determined after that year is over, when the flood inflows have been measured, adjusted, and averaged and the calculation made by the inflow-outflow equation. The Compact is not an illusory contract that deprives Texas of any meaningful remedy. "It is difficult to conceive that Texas would trade away its right to seek an equitable apportionment of the river in return for a promise that New Mexico could, for all practical purposes, avoid at will." (footnote omitted.) 462 U.S. at 569.

It should be emphasized that the proposed remedy of requiring New Mexico to pay back accumulated departures over the 1950-1983 period is not based on any finding that New Mexico acted in a reprehensible manner. It is clear from the Commission minutes that during the entire period of the Compact's existence it has been difficult to ascertain whether or not New Mexico has met its delivery obligations in any particular year, but this difficulty should not deprive Texas of its rightful share of Pecos River water.

As the Court made clear, 462 U.S. at 568-569, if the Commission cannot agree as to what Texas should receive under the Compact, Texas has a right to pursue a judicial remedy. This of course is not a perfect solution. Even if Texas

receives an amount of water over the next ten years equalling the accumulated negative departures over the 1950-1983 period, she is not made completely whole. New Mexico has had the advantage of more than its equitable share of water during the period 1950 to 1983 while Texas will receive its water in the future years of 1989 to 1999. When the water is discounted to present value, Texas is worse off and New Mexico better off as a result of the departures. This is why I recommend that New Mexico be required to pay back the accumulated departures over a period not greater than ten years and why interest should be charged if New Mexico does not meet the proposed good faith standard for compliance with the decree. The longer Texas must wait, the less the value of what she receives under the decree and the Compact. The evidence is clear that Texas can put this water to immediate use. Tr. 404-405 (5/21/86). The Red Bluff Reservoir, which has a capacity of 310,000 acre-feet, is at the present time virtually dry. Tr. 403-404 (5/21/86). Clearly, Texas can make use of the water that it is entitled to but has been deprived of for the last 30 years.

### **C. Enforcement of the Decree.**

Any decree which requires New Mexico to honor the Article III(a) obligation in the future and repay past deficits requires a determination annually of that year's 1947 condition and the departure, whether positive or negative, from the state-line delivery obligation. New Mexico and her officials can be enjoined to deliver a specified quantity of water but to enjoin them to determine the departure from the 1947 condition would be infeasible because of the judgment that must be exercised in making the determination. Other enforcement mechanisms must be found, and three are considered here. They are:

1. Appointment of a River Master, such as the Court did in *New Jersey v. New York*, 347 U.S. 495 (1954), cited in *Texas v. New Mexico*, 462 U.S. 554, 566, n.11 (1983);
2. An injunction issued to the Pecos River Commission to enforce the decree; or

### 3. Enforcement of the decree by judicial means.

The Court's 1983 opinion may allow room for appointment of a River Master with the responsibility of applying the law of this case to determine departures from the 1947 condition for the sole purpose of determining whether New Mexico has complied with the decree. But the Court is reluctant to employ river masters (*Texas v. New Mexico*, 462 U.S. at 566), and I am therefore reluctant to recommend such action.

Enforcement of the decree could be left to the Compact Commission. Each year it would determine for the prior year: (1) New Mexico's Article III(a) obligation, and (2) the amount of water reaching the state line. From these two findings the Commission could then determine whether New Mexico has met its annual minimum delivery obligation (or exceeded it). If not, the deficit amount could be determined; this process would be repeated each year. If the Commission performed these tasks, it would not only be enforcing the decree as to past water delivery deficits, it would also be determining contemporary compliance with the Article III(a) obligation. Three questions arise about this possible remedy. (1) Should the Commission be enjoined to make the necessary determinations? (2) If so, should the Commission be enjoined to use a particular methodology for making the determinations, until it agreed on a different methodology? (3) Should those determinations apply not only to past delivery obligations but also to future obligations? Texas supports an affirmative answer to all those questions, and tendered a provisional manual (Tex. Exh. 103) for making the necessary determinations. New Mexico would answer all three questions in the negative but offered its manual in case the Court accepted the Texas position. (New Mex. Exh. 62).<sup>21</sup>

<sup>21</sup> Both manuals were admitted solely as suggested manuals for use "in the event that the Court should impose such a manual [upon the Commission]." Tr. 338 (5/31/86); Tr. 237 (5/20/86).



If the slate were clean, I would accept the Texas position as a practical and fair way to bring Pecos River Compact litigation to a final conclusion. But my reading of the Court's opinion in *Texas v. New Mexico*, 462 U.S. 554 (1983) discerns a pervasive reluctance by the Court to issue orders to the Commission binding it to act in a certain way or to adopt a particular methodology.

Enforcement of the decree is thus left to agreement by the Commission or to judicial action. If the Commissioners are unable to agree on what the current Article III(a) obligation is, neither the parties nor this Court will know whether New Mexico has satisfied the decree or not. In that event, Texas would have to apply to the Court for enforcement of the decree, and a proceeding to determine the 1947 condition, under the principles and methodologies stipulated or ordered herein, would ensue. If such proceedings should become the norm, the Court would presumably reconsider the question of appointing a River Master or enjoining action by the Commission.

While judicial enforcement of the decree may operate smoothly, I would be remiss in my duty to the Court to ignore the difficulties that can arise in determining New Mexico's compliance with the decree. As noted briefly earlier in this Report, compliance with the decree will require either the Commission, a River Master or the Court to make the following determinations: (1) what is the Article III(a) obligation for the year in question? This determination must be made because the starting point each year for testing compliance with the decree is that year's Article III(a) obligation. The next question to be answered is, (2) was the Article III(a) obligation met? If not, then New Mexico has not satisfied the annual minimum delivery obligation of the decree, and the deficit amount must be determined. If New Mexico has met her Article III(a) obligation, the amount of excess water she has delivered must be determined so she can receive credit for it towards her obligation under the decree. But the reference point in either



case must be the Article III(a) obligation, which must be determined annually and which will change annually as water supply conditions vary from year to year. It must be emphasized that this requirement of an annual determination of the Article III(a) obligation is not a product of the particular requirements of the relief proposed in this Report; *any* decree that requires New Mexico to meet its Article III(a) obligation and deliver water to Texas over a period of time to compensate for underdeliveries during the 1950-1983 period will encounter the necessity of an annual determination of the Article III(a) obligation.

In addition, for the period of time not litigated in this action, 1984 forward, there must also be a determination by someone of the Article III(a) obligation. If the Commission cannot agree, another original action may be the only choice Texas has.

Thus, in the worst of circumstances, two proceedings to determine the Article III(a) obligation could be taking place at the same time. To take the year 1990 as an example, Texas might have to file an enforcement action to obtain water due under the decree and it might also have to file another original action to determine what it is owed from 1984 to 1990. Both actions would require determination of the 1990 Article III(a) obligation, and the answer in each action might be different. Perhaps this worst case scenario is far fetched. But it remains true that in every year hereafter, the 1947 condition must be determined for two purposes: (1) for payment of the water debt owing from 1950-1983 and (2) for the water debt, if any, arising in 1984 and thereafter. It seems desirable to have those determinations made by one decision-maker, employing a single standard of decision and producing one numerical value for the Article III(a) obligation.

That result can be reached if either of two alternatives is accepted by the Court: (1) the alternative proposed by Texas, that the Commission be enjoined to apply a Manual such as

Tex. Exh. 103, or possibly N. Mex. Exh. 62, to future years beginning with 1984 until the Commission adopts some other standard for measuring the 1947 condition; or (ii) the alternative I would recommend (which I believe is more consistent with the Court's views regarding the Pecos River Commission) that the Commission, or another designated entity such as a River Master, be enjoined to utilize Tex. Exh. 79, appropriately modified to reflect the Court's legal determination as to which of man's activities are not chargeable to New Mexico, as a basis for determining both New Mexico's Article III(a) obligation and its compliance with the decree for the mandated ten-year delivery schedule. Since Tex. Exh. 79 utilizes the routing study adopted by this Court in *Texas v. New Mexico*, 467 U.S. 1238 (1984) for determining the 1947 condition, such a requirement would not impinge unduly upon the prerogatives of the Commission and at the same time would allow for enforcement of the decree.

I have included a proposed decree with this Report incorporating the recommendations made above.

Denver, Colorado, July ....., 1986.

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Charles J. Meyers  
Special Master

**APPENDIX A**  
**PROPOSED DECREE**

**IT IS ORDERED, ADJUDGED AND DECREED THAT**

**I. For purposes of this decree:**

(A) "Annual Minimum Delivery Obligation" shall mean the annual amount of water owed by New Mexico to Texas under this decree over and above the Article III(a) obligation.

(B) "Index Inflow" shall mean the three year progressive average of "annual flood inflows" as those terms are defined in Tex. Exh. 79, Table 2 at page 5.

(C) "Water Interest" shall equal the return on one year treasury bills as of the date that it is determined that New Mexico has not met its obligations under this decree.

**II. The State of New Mexico, its officers, attorneys, agents, and employees be and they are hereby severally enjoined:**

(A) To comply with the Article III(a) obligation of the Pecos River Compact by delivering to Texas at state line each year an amount of water calculated in accordance with the inflow-outflow equation contained in Tex. Exh. 68 at page 2.

(B) To calculate the Index Inflow component of the inflow-outflow equation by using the inflow-outflow and channel loss equations contained in Tex. Exh. 79.<sup>1</sup>

(C) To deliver to Texas at state line an additional amount of water aggregating 340,100 acre feet over a period of ten years as specified in Article III of this Decree and to deliver to Texas at state line not less than 34,010 acre feet of water per year for ten years to satisfy the Annual Minimum Delivery Obligation.

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<sup>1</sup> Tex. Exh. 79 will have to be modified to reflect decisions by the Court as to man-made depletions chargeable to New Mexico.

III. New Mexico is granted three years from the date of this Decree to commence performance of the Annual Minimum Delivery Obligation, provided that during the three-year period she demonstrates good faith by complying with the Article III(a) obligation in each of the three years. If New Mexico fails to demonstrate such good faith, New Mexico shall commence performance of the Annual Minimum Delivery Obligation of 34,010 acre feet at the beginning of the year next ensuing after the year of default in the Art. III(a) obligation.

IV. If New Mexico shall have failed to deliver to Texas at state line at the end of five years from the date specified in Article III of this Decree 136,040 acre feet of water (being eighty percent of 170,050 acre feet of water owed by New Mexico during this five-year period), New Mexico shall pay to Texas, in addition to any amounts owed under this Decree, Water Interest on all amounts undelivered during the five-year period as well as Water Interest on the balance of the amount New Mexico owes to Texas under Section II(B) of this Decree.

V. [If an arbiter is appointed] The Pecos River Commission, its officers and employees [or, the River Master] are enjoined to make the calculations provided for in this Decree annually as promptly as data are available and to report the calculations to appropriate representatives of the State of New Mexico and the State of Texas.





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No. 65, Original

Supreme Court, U.S.  
**F I L E D**

**DEC 18 1986**

**JOSEPH F. SPANIOL, JR.**  
CLERK

**IN THE**  
**Supreme Court of the United States**  
**OCTOBER TERM, 1986**

**STATE OF TEXAS,**

*Plaintiff,*

**vs.**

**STATE OF NEW MEXICO,**

*Defendant.*

**Exception of the State of Texas  
to Report of the Special Master and Brief in Support**

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
EXCEPTION TO THE REPORT OF THE SPECIAL MASTER .....	1
JURISDICTION .....	3
STATUTE INVOLVED .....	3
STATEMENT OF THE CASE .....	3
SUMMARY OF ARGUMENT .....	7
ARGUMENT:	
For the 1962-1983 Period, the 27,600 Acre-Feet of Depar- tures from New Mexico's Article III(a) Delivery Oblig- ations Caused by the McMillian Dike Are Depletions Due to Man's Activities and, Therefore, Are Chargeable Against New Mexico .....	8
CONCLUSION .....	14
APPENDIX A (Pecos River Compact) .....	A-1
APPENDIX B (Proposed Decree, as Modified) .....	B-1
APPENDIX C (Commission Findings, 1950-1961) .....	C-1

# TABLE OF AUTHORITIES

Cases:	Page
<i>Automobile Club of Michigan v. Commissioner</i> , 353 U.S. 180 (1957) .....	12
<i>Dixon v. United States</i> , 381 U.S. 68 (1965) .....	13
<i>Federal Crop Insurance Corp. v. Merrill</i> , 332 U.S. 380 (1947) .....	12
<i>Schweiker v. Hansen</i> , 450 U.S. 785 (1981) .....	12
<i>Texas v. New Mexico</i> , 467 U.S. 1238 (1984) .....	3,5
<i>Texas v. New Mexico</i> , 462 U.S. 554 (1983) .....	3,4,9,13
<i>Texas v. New Mexico</i> , 446 U.S. 540 (1980) .....	3,5
Constitution and Statutes:	
U.S. Const. art. I, § 10, cl. 3 .....	13
U.S. Const. art. III, § 2, cl.2 .....	3
Pecos River Compact, 63 Stat. 159 (1949) .....	<i>passim</i>
28 U.S.C. § 1251(a)(1) .....	3
Other materials:	
New Mexico State Engineer, <i>22nd Biennial Report</i> (1956) .....	8
Stip. Exh. 1 .....	12
Stip. Exh. 4(b) .....	9,10
Stip. Exh. 7 .....	10,11
Tex. Exh. 79 .....	5,6

No. 65, Original

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

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STATE OF TEXAS,

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STATE OF NEW MEXICO,

*Defendant.*

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**EXCEPTION TO THE REPORT OF  
THE SPECIAL MASTER**

The Court ordered the July 31, 1986, Report of the Special Master filed on October 6, 1986. In this exception and the supporting brief, the report will be referred to as the 1986 Report.

Texas accepts the 1986 Report, except for one matter. Texas objects to the determination that, for the years 1962 through 1983, departures from New Mexico's delivery obligations to Texas under the Pecos River Compact caused by the existence of a training dike in the McMillan Reservoir ("McMillan dike") will not be characterized as depletions due to man's activities.

Respectfully submitted,

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No. 65, Original

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

---

STATE OF TEXAS,

*Plaintiff,*

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STATE OF NEW MEXICO,

*Defendant.*

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**BRIEF IN SUPPORT OF TEXAS' EXCEPTION**

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**JURISDICTION**

The original jurisdiction of the Court was invoked under Article III, Section 2, clause 2 of the United States Constitution and 28 U.S.C. § 1251(a)(1).

**STATUTE INVOLVED**

The Pecos River Compact, 63 Stat. 159 (1949), governs this case. Appendix A to the brief sets forth the Compact.

**STATEMENT OF THE CASE**

**1986 Report**

Three times in the past, the Court has received and ruled on reports from a Special Master in this case: in 446 U.S. 540 (1980), the Court ruled on the 1979 Report; in 462 U.S. 554 (1983), it ruled on the 1982 Report; and in 467 U.S. 1238 (1984), it ruled on the 1984 Report. Now, through its ruling on the 1986 Report, the Court will conclude the final phase of the litigation.

The Court's opinion in *Texas v. New Mexico*, 462 U.S. 554 (1983) ("1983 Pecos decision"), discusses the historical background to the litigation, *id.*, at 556-62, and it need not be repeated here. For present purposes, only a brief outline is needed of the litigation mileposts which have led to the presentation of the issues now before the Court.

Texas initiated the litigation in June, 1974, when it filed its complaint that New Mexico was violating its delivery obligations under the Pecos River Compact ("Compact"). New Mexico's delivery obligation is established by Article III(a) of the Compact:

New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition.

The Texas complaint was, and continues to be, that since 1950 New Mexico has not delivered Pecos River water to Texas at the New Mexico-Texas state line in accordance with its Article III(a) obligations.

In the final part of its 1983 Pecos decision, the Court marked the course for the rest of the litigation:

The crucial question that remains to be decided is ...: "[H]as New Mexico fulfilled her obligations under Article III(a) of the Pecos River Compact?" ... That question necessarily involves two subsidiary questions. First, under the proper definition of the "1947 condition," ... what is the difference between the quantity of water Texas could have expected to receive in each year and the quantity it actually received? ... Second, to what extent were the shortfalls due to "man's activities in New Mexico"?

462 U.S. at 574-75. In addition to recommending remedies to insure future Compact compliance, the 1986 Report answers the Court's questions and explains the factual and legal bases for them. See 1986 Report 31 (table summarizing

answers).<sup>1</sup> Its conclusion is that, for the 1950-1983 period, New Mexico failed to deliver to Texas 340,100 acre-feet of water which Article III(a) of the Compact obligated it to deliver.

Texas takes exception to only one part of the Special Master's answer: the Special Master's conclusion that departures from New Mexico's Article III(a) obligations during the 1962-1983 period caused by the McMillan dike cannot be characterized as depletions due to man's activities. 1986 Report 18. If the Court sustains Texas' exception, then 27,600 acre-feet of water must be added to New Mexico's Article III(a) shortfall for the 1950-1983 period, resulting in its owing Texas 367,700 acre-feet of water for the period.

### **Proposed Decree**

Before turning to legal argument on its exception to the 1986 Report, Texas needs to focus the Court's attention on one other matter pertinent to the case. The specificity and consequent enforceability of the final decree in this case are critical to Texas. Attached to the 1986 Report as Appendix A is a Proposed Decree prepared by the Special Master. As Texas understands it, the 1986 Report, not the Proposed Decree, is the reference point for any exceptions, and Texas has only one exception to the 1986 report. There are, however, three areas in which the 1986 Report is not fully reflected in the Proposed Decree. The three discrepancies appear to arise from inadvertence. They are discussed below.<sup>2</sup>

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1. Prior to the 1986 Report, two elements leading to the answer to the first of the two subsidiary questions had been supplied. The proper definition of the 1947 condition was established by the Court's approval of the 1979 Report. 446 U.S. 540 (1980). The quantity of water Texas could have expected to receive under the 1947 condition each year of the 1950-1983 period was established by the Court's approval of the 1984 Report. 467 U.S. 1238 (1984). Column 5 of Table 2 on page 5 of stipulated Texas Exhibit 79 lists these quantities.

2. Attached to this brief as Appendix B is the Special Master's Proposed Decree, as it would be modified: (a) to correct for what Texas views as three inadvertent discrepancies between it and the 1986 Report; and (b) to reflect the sustaining of Texas' sole exception to the 1986 Report. The modifications are in bold-face type.

### *Discrepancy 1*

In the last line of Section II(B), the phrase "and the other procedures" should be inserted before "contained in Tex. Exh. 79." The Section II(A) computation is a function of the calculation required in Section II(B). To complete the Section II(A) computation, more than just the "inflow-outflow and channel loss equations contained in Tex. Exh. 79" will be required, although they are the most significant factors in the computation. The "other procedures" used in Texas Exhibit 79, which was admitted into evidence by stipulation, also will be required.

The discussion in the text of the 1986 Report suggests that the omission was inadvertent. In the course of explaining how Texas Exhibit 79 had taken into account all natural depletions, thereby leaving only man-made depletions as the cause of New Mexico's delivery shortfall, the Special Master finds that "Dr. Murthy's testimony made it clear that the *procedures* followed in Tex. Exh. 79 accounted for all non-manmade depletions . . ." 1986 Report 9 (emphasis added). Later, in discussing remedies, the Special Master recommends that an injunction issue "to utilize Tex. Exh. 79 . . . as a basis for determining . . . New Mexico's Article III(a) obligation . . ." 1986 Report 46. No suggestion is made to limit the use to the inflow-outflow and channel loss equations. In fact, because the purpose is to provide a basis for determining the Article III(a) obligation and because all the Texas Exhibit 79 procedures must be used to complete that determination, the implication is that all the procedures should be used. It is for these reasons that Texas suggests the correction of this discrepancy.

### *Discrepancy 2*

In the last line of Section IV of the Proposed Decree, "II(B)" should be changed to "II(C)". II(C), not II(B), sets forth the amount of past-due water New Mexico owes Texas.

### *Discrepancy 3*

In Section IV, a second sentence should be added to establish, as the Special Master intended, that the water interest principle applies to each of the last five years of the pay back period,

as well as, in the aggregate, to the first five years of the pay back period. In his discussion of good faith and water interest, the Special Master defined good faith as

meeting at least 80% of the aggregate minimum delivery requirement for the first five years, *and the annual minimum delivery obligation each year thereafter.*

1986 Report 37 (emphasis added). See also *id.* n. 16 ("if New Mexico meets 80% of its obligation during the first five years *and each year thereafter*" (emphasis added)).

The Proposed Decree's Section IV, as it now reads, does not reflect the 1986 Report because it does not extend the water interest principle to each of the last five years of the pay back period. For example, if New Mexico were to escape the imposition of water interest during the first five years of the pay back period by meeting the 80% good faith standard, but then, on the sixth year, fail to pay back 80% of its Annual Minimum Delivery Obligation, the Proposed Decree would not impose water interest, even though the text of the 1986 Report demonstrates that the Special Master recommends that it be imposed in such a situation.

### SUMMARY OF ARGUMENT

The construction of the McMillan dike in 1954 caused less water to seep from the McMillan Reservoir. Consequently, less Pecos River water reached Texas than would have if the dike had never been constructed. For the relevant 1962-1983 period, the McMillan dike prevented 27,600 acre-feet of water from reaching Texas that would have under the 1947 condition of the river, which was a condition that did not include the dike's existence.

Under Article III(a) of the Compact, these McMillan dike depletions are due to "man's activities" and, consequently, must be charged to New Mexico. This legal conclusion is unaltered by the fact that, in 1961 and 1962, the Pecos River Commission made findings of fact that did not charge McMillan dike depletions to New Mexico for the 1950-1961 period.



The 1961 and 1962 Commission findings did not purport to bind later Commissions to the same characterization of McMillan dike depletions when making findings for the years after 1961. Instead, the transcripts of the Commission meetings demonstrate that, despite an expressed displeasure with the characterization of the depletions, Texas acquiesced in it for the 1950-1961 period as an accommodation to New Mexico. That is, for now obscure reasons, Texas made a limited "deal" with New Mexico, notwithstanding the fact that the law did not require Texas to make it. New Mexico's efforts to convert the limited nature and duration of the accommodation into a permanent legal arrangement must fail.

Even if the Commission at the time had tried to permanently bind future Commissions' actions by an agreement so patently at odds with reality and the clear language of the Compact, it lacked the power to do so. That kind of action would constitute an amendment of the Compact. Under the Compact Clause of the Constitution, amendments can become effective only through ratification by the Texas and New Mexico legislatures and approval by Congress. None of these legislative steps has been taken since the initial Congressional approval of the Compact.

## ARGUMENT

**For the 1962-1983 Period, the 27,600 Acre-Feet of Departures from New Mexico's Article III(a) Delivery Obligations Caused by the McMillan Dike Are Depletions Due to Man's Activities and, Therefore, Are Chargeable Against New Mexico.**

The McMillan Reservoir in New Mexico sits astride the Pecos River and impounds part of its flow. In 1954, the State of New Mexico, in cooperation with the United States Bureau of Reclamation and the New Mexico-based Carlsbad Irrigation District, built a dike along the reservoir's east side. Its purpose was to reduce seepage losses from the reservoir into a cavernous section located along the eastern shoreline. New Mexico State Engineer, *22nd Biennial Report*, at 53-54 (1956). The reduction in seepage losses caused by construction of the

McMillan dike resulted in less Pecos River water reaching Texas at the state line than would have reached it if the dike had not been built. For the 1962-1983 period, 27,600 acre-feet less water reached Texas as a result of the McMillan dike. 1986 Report 21-22.

Article III(a) of the Compact prohibits such depletions if they are due to "man's activities." Standing alone, the plain language of the Compact provides easy answers to any questions about the proper characterization and legal treatment of this 27,600 acre-feet of water. The McMillan dike was constructed by humans and, consequently, any depletions in the flow of the river at the state line are due to "man's activities." Because the McMillan dike did not exist until after 1947, the 1947 condition of the river—the benchmark of the Compact in general and Article III(a) in particular—cannot include the dike's existence and effects. Therefore, depletions due to the McMillan dike that are reflected at the state line mean that Texas is receiving less water due to man's activities than it would have under the 1947 condition. Because those depletions equal 27,600 acre-feet, New Mexico must be found to have fallen below its Article III(a) obligation by that amount.

The Compact makes the logic and its conclusion seemingly unassailable; yet, the Special Master rejects Texas' argument for the 1962-1983 period. 1986 Report 18. The rejection has two bases. First, he finds that the Court disposed of Texas' contention by holding in its 1983 Pecos decision that Commission actions on delivery obligations are dispositive. *Id.* Second, he finds that Pecos River Commission ("Commission") actions in 1961 and 1962 resolved the contention against Texas by placing a valid interpretive gloss on ambiguous Compact terms as they apply to the McMillan dike. *Id.* To understand the error in the Special Master's findings on this point, the Court must focus its attention on two crucial Commission meetings.

At its annual meetings in 1961 and 1962, the Commission, among other things, endeavored to determine the negative departures from New Mexico's Article III(a) delivery obligations for the 1950-1961 period. *See generally* Minutes of the Commission, January 31, 1961, Stip. Exh. 4(b) at 231-48; and Minutes of the Commission, November 9, 1962, Stip. Exh. 4(b)

at 256-58. For the first and, thus far, the only time in its history, the Commission reached an agreement on departures. It determined the negative departures for the 1950-1961 period. 1986 Report 4-6 (negative departures equalled 53,300 acre-feet).

The McMillan dike was one of the dominant concerns of the Commission during the 1961 and 1962 deliberations, because the negative departures for the 1950-1961 period could not be finally determined until any controversies about the dike were settled. The fullest exposition of the McMillan dike issue is found not in the minutes of the Commission meetings (Stip. Exh. 4(b)), but in the transcripts of the meetings (Stip. Exh. 7).

At the 1961 Commission meeting, a Joint Memorandum signed by the Commissioners for Texas and New Mexico and by the Chair of the Engineering Advisory Committee to the Commission was made part of the Commission record. In a discussion covering several pages, most of which is omitted here, the memorandum made the following observations:

Another troublesome problem is how to deal with the leakage at Lake McMillan. . . . There was quite a sudden change after the unprecedented flood flows of 1941 and 1942. . . . The question is should the actual leakage that was taking place under 1947 conditions be used . . . in defining the 1947 conditions or should present conditions be used, or should the leakage that was occurring prior to the flood of 1941 and 1942 be used.

The Commissioners recognize that *morally* New Mexico should not be penalized for an unusual act of nature such as occurred in 1941.

Transcript of the Commission, January 31, 1961, Stip. Exh. 7 at 30-31 (emphasis added). The memorandum concluded the McMillan dike discussion with a recommendation which made negative departures due to the dike not chargeable to New Mexico. *Id.* at 32.

A short time later in the meeting, Mr. Tipton, the Chair of the Engineering Advisory Committee, discussed the McMillan dike issue again. *Id.* at 46. He restated the position of Mr.

Reese, the New Mexico Commissioner, that New Mexico should not be charged for McMillan dike depletions, then pointedly noted "[t]hat Mr. Vandertulip [the Engineer Advisor to the Texas Commissioner] by no means at the moment agrees with that interpretation." *Id.* at 46-47. The discussion of the McMillan dike issue ends obscurely with the passage of a motion encompassing several subjects, which, among other things, made findings of fact through the year 1959. *Id.* 52-53.

At its next meeting in 1962, in the midst of trying to determine the negative departures for the 1950-1961 period, the Commission once again took up the McMillan dike issue. Transcript of the Commission, November 9, 1962, Stip. Exh. 7 at 59-64. A document making tabulations for the relevant period was circulated, and the Engineer Advisor to the Texas Commissioner suggested deletion of part of it. *Id.* at 62. The Commission made the deletion, added a new sentence to the document, and adopted the document as findings of fact for the 1950-1961 period. *Id.* at 62-64.<sup>3</sup> The paragraph deleted at Texas' behest had dealt with the McMillan dike and had specified that departures due to the dike were not chargeable as a result of man's activities. See Appendix C to this brief. Since the 1962 meeting, the Commission has not spoken again to the proper characterization of depletions due to the McMillan dike, and Texas has offered no further accommodations to New Mexico on this issue.

This spotlight on the 1961 and 1962 Commission meetings reveals a subtly different scene than depicted by the Special Master. In the Special Master's view, the Texas Commissioner acquiesced to a permanent legal interpretation of ambiguous Compact provisions as they applied to the McMillan dike, thereby forever binding Texas to a legal result patently at odds with reality and Article III of the Compact. Nowhere do the Commission transcripts reflect that Texas viewed its agreement as being permanent. The period then under consideration

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3. With some irrelevant omissions, the *unamended* version is reproduced by the Special Master. 1986 Report 16. Attached to this brief as Appendix C is the document with the Commission's modifications highlighted. The part deleted pursuant to Texas' suggestion is in italics. The part added after the foregoing deletion is in bold-face.

ended in 1961. Future departures were not even at issue. Twice during the discussions, the Commission was put on notice that the Texas Engineering Advisor did not agree with the characterization of the McMillan dike depletions. The Commission transcripts also fail to reflect that Texas viewed its agreement as one embodying a legal interpretation. A moral obligation was acknowledged, but the use of the word "morally" implies that the law—that is, the Compact—did not provide independent authority for the characterization adopted by the Commission.<sup>4</sup> Finally, the relevant Compact provisions—"man's activities" and "1947 condition"—are not ambiguous in the McMillan dike context. Both the dike and the depletions resulting from it incontrovertably are due to man's activities. The 1947 condition of the river could not encompass the McMillan dike, which was not even constructed until 1954.

The better view is that, for reasons that remain obscure, the Texas Commissioner made an accommodation with New Mexico for a specific time period—1950-1961. In plain terms, Texas made a deal with New Mexico that, regardless of the Compact, it would not treat McMillan dike depletions as man's activities for the 1950-1961 period. The accommodation did not reach past 1961. Nothing was said about the future.

In other settings, the Court has refused to bind an agency forever to a legally unsound action ostensibly taken pursuant to a federal statute, or to an erroneous interpretation of a federal statute by one of the agency's officials or employees. In *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), the Court held that a federal agency was not bound by the actions and representations of one of its officials, even when there had been detrimental reliance on the representations. *See also Schweiker v. Hansen*, 450 U.S. 785 (1981). In *Automobile Club of Michigan v. Commissioner*, 353 U.S. 180 (1957), the Court held:

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4. Now, over twenty-five years later and with the advantage of hindsight, even the moral obligation is hard to discern. At least as early as 1949, it appears that the impact of the 1941 floods on the seepage from McMillan Reservoir was well known. *See* Sen. Doc. 109, Stip. Exh 1 at 3 ("high water of 1941 opened other holes in the reservoir") and 71 (noting increasing reservoir leakage since 1940). Thus, at the time the Compact bargain was struck, the parties seem to have been aware of the seepage conditions at the McMillan Reservoir, yet made no separate provision for them in the Compact.



the doctrine of equitable estoppel is not a bar to the correction by the Commissioner of a mistake of law.

353 U.S. at 183.

The general principle underlying these decisions is that the duty of lawmaking lies within the legislative realm, not the executive realm. See, e.g., *Dixon v. United States*, 381 U.S. 68, 73 (1965). Those individuals charged with enforcing laws or interpreting them for the public are not free to amend them in the course of employment through inadvertence or intention.

These principles apply here. The Compact is a federal law. *Texas v. New Mexico*, *supra*, 462 U.S. at 564. The members of the Commission it created are not empowered to amend it as they see fit. While they may be empowered to make "findings" about changes in depletions due to man's activities, see Compact, art. V(d)5, the findings are not conclusive in court, *id.*, art. V(f). The findings are supposed to be determinations of *past* depletions based upon historical data. *Id.*, art. VI(b). The power of the Commissioners to make findings does not include the power to permanently bind subsequent Commissions to agreements affecting determinations of future depletions, especially when the agreements contravene the plain language of the Compact. That would constitute an amendatory power not conferred on them by the Compact Clause of the Constitution, U.S. Const., Art. I, § 10, cl. 3.

The Commissioners did not try to make a permanently binding legal interpretation of the characterization of the McMillan dike depletions at the 1961 and 1962 annual meetings. If they had tried, they would have exceeded their legal authority under the Compact and the Compact Clause of the Constitution. They only reached an agreement and made findings for the 1950-1961 period. Thus, the Court is left with the straightforward logic and facts already discussed. See p. 9, *supra*. The McMillan dike depletions for the 1962-1983 period resulted in negative departures from the 1947 condition, and they are due to man's activities. In these circumstances, they are chargeable to New Mexico in the amount of 27,600 acre-feet.

## CONCLUSION

For the foregoing reasons, the exception of the State of Texas to the 1986 Report should be sustained. In all other respects, the Court should adopt the recommendations in the 1986 Report.

Respectfully submitted,

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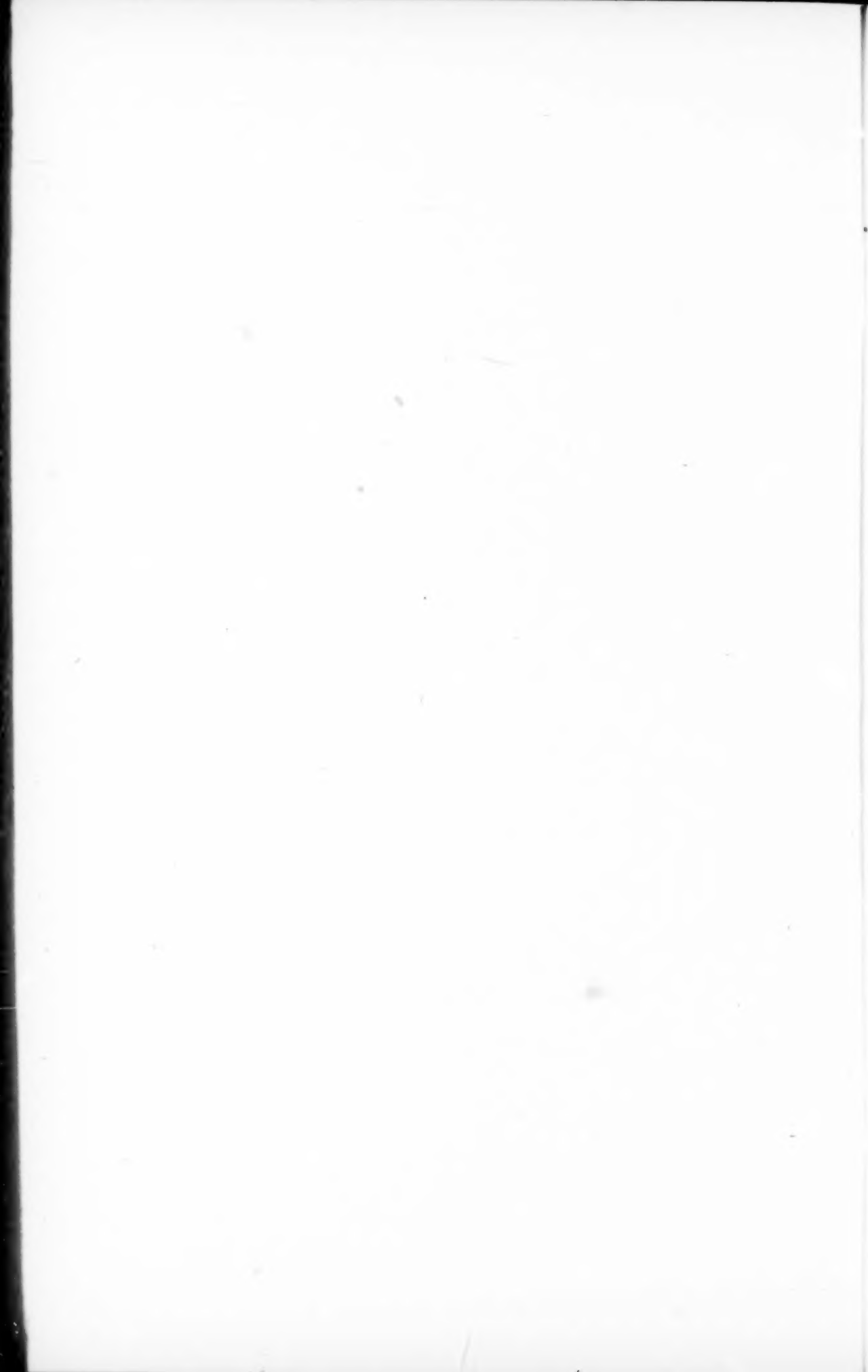
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## APPENDIX A

### PECOS RIVER COMPACT

(63 Stat. 159, 160-165)

The State of New Mexico and the State of Texas, acting through their Commissioners, John H. Bliss for the State of New Mexico and Charles H. Miller for the State of Texas, after negotiations participated in by Berkeley Johnson, appointed by the President as the representative of the United States of America, have agreed respecting the uses, apportionment and deliveries of the water of the Pecos River as follows:

#### ARTICLE I

The major purposes of this Compact are to provide for the equitable division and apportionment of the use of the waters of the Pecos River; to promote interstate comity; to remove causes of present and future controversies; to make secure and protect present development within the states; to facilitate the construction of works for, (a) the salvage of water, (b) the more efficient use of water, and (c) the protection of life and property from floods.

#### ARTICLE II

As used in this Compact:

(a) The term "Pecos River" means the tributary of the Rio Grande which rises in north-central New Mexico and flows in a southerly direction through New Mexico and Texas and joins the Rio Grande near the town of Langtry, Texas, and includes all tributaries of said Pecos River.

(b) The term "Pecos River Basin" means all of the contributing drainage area of the Pecos River and its tributaries above its mouth near Langtry, Texas.

(c) "New Mexico" and "Texas" means the State of New Mexico and the State of Texas, respectively; "United States" means the United States of America.

(d) The term "Commission" means the agency created by this Compact for the Administration thereof.

(e) The term "deplete by man's activities" means to diminish the stream flow of the Pecos River at any given point as the result of beneficial consumptive uses of water within the Pecos River Basin above such point. For the purposes of this Compact it does not include the diminution of such flow by encroachment of salt cedars or other like growth, or by deterioration of the channel of the stream.

(f) The term "Report of the Engineering Advisory Committee" means that certain report of the Engineering Advisory Committee dated January, 1948, and all appendices thereto; including, basic data, processes, and analyses utilized in preparing that report, all of which were reviewed, approved, and adopted by the Commissioners signing this Compact at a meeting held in Santa Fe, New Mexico, on December 3, 1948, and which are included in the Minutes of that meeting.

(g) The term "1947 condition" means that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee. In determining any question of fact hereafter arising as to such situation, reference shall be made to, and decisions shall be based on, such report.

(h) The term "water salvaged" means that quantity of water which may be recovered and made available for beneficial use and which quantity of water under the 1947 condition was non-beneficially consumed by natural processes.

(i) The term "unappropriated flood waters" means water originating in the Pecos River Basin above Red Bluff Dam in Texas, the impoundment of which will not deplete the water usable by the storage and diversion facilities existing in either state under the 1947 condition and which if not impounded will flow past Girvin, Texas.

### ARTICLE III

(a) Except as stated in paragraph (f) of this Article, New Mexico shall not deplete by man's activities the flow of the Pecos



River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition.

(b) Except as to the unappropriated flood waters thereof, the apportionment of which is included in and provided for by paragraph (f) of this Article, the beneficial consumptive use of the waters of the Delaware River is hereby apportioned to Texas, and the quantity of such beneficial consumptive use shall be included in determining waters received under the provisions of paragraph (a) of this Article.

(c) The beneficial consumptive use of water salvaged in New Mexico through the construction and operation of a project or projects by the United States or by joint undertakings of Texas and New Mexico, is hereby apportioned forty-three per cent (43%) to Texas and fifty-seven per cent (57%) to New Mexico.

(d) Except as to water salvaged, apportioned in paragraph (c) of this Article, the beneficial consumptive use of water which shall be non-beneficially consumed, and which is recovered, is hereby apportioned to New Mexico but not to have the effect of diminishing the quantity of water available to Texas under the 1947 condition.

(e) Any water salvaged in Texas is hereby apportioned to Texas.

(f) Beneficial consumptive use of unappropriated flood waters is hereby apportioned fifty per cent (50%) to Texas and fifty per cent (50%) to New Mexico.

#### ARTICLE IV

(a) New Mexico and Texas shall cooperate to support legislation for the authorization and construction of projects to eliminate non-beneficial consumption of water.

(b) New Mexico and Texas shall cooperate with agencies of the United States to devise and effectuate means of alleviating the salinity conditions of the Peco River.

(c) New Mexico and Texas each may:

(i) Construct additional reservoir capacity to replace reservoir capacity made unusable by any cause.

(ii) Construct additional reservoir capacity for the utilization of water salvaged and unappropriated flood waters apportioned by this Company [sic] to such state.

(iii) Construct additional reservoir capacity for the purpose of making more efficient use of water apportioned by this Compact to such state.

(d) Neither new Mexico nor Texas will oppose the construction of any facilities permitted by this Compact, and New Mexico and Texas will cooperate to obtain the construction of facilities that will be of joint benefit to the two states.

(e) The Commission may determine the conditions under which Texas may store water in works constructed in and operated by New Mexico.

(f) No reservoir shall be constructed and operated in New Mexico above Avalon Dam for the sole benefit of Texas unless the Commission shall so determine.

(g) New Mexico and Texas each has the right to construct and operate works for the purpose of preventing flood damage.

(h) All facilities shall be operated in such manner as to carry out the terms of this Compact.

## ARTICLE V

(a) There is hereby created an interstate administrative agency to be known as the "Pecos River Commission." The Commission shall be composed of one Commissioner representing each of the states of New Mexico and Texas, designated or appointed in accordance with the laws of each such state, and, if designated by the President, one Commissioner representing the United States. The President is hereby requested to designate such a Commissioner. If so designated, the Com-

missioner representing the United States shall be the presiding officer of the Commission, but shall not have the right to vote in any of the deliberations of the Commission. All members of the Commission must be present to constitute a quorum.

(b) The salaries and personal expense of each Commissioner shall be paid by the government which he represents. All other expenses which are incurred by the Commission incident to the administration of this Compact and which are not paid by the United States shall be borne equally by the two states. On or before November 1 of each even numbered year the Commission shall adopt and transmit to the Governors of the two states and to the President a budget covering an estimate of its expenses for the following two years. The payment of the expenses of the Commission and of its employees shall not be subject to the audit and accounting procedures of either of the two states. However, all receipts and disbursements of funds handled by the Commission shall be audited yearly by a qualified independent public accountant and the report of the audit shall be included in, and become a part of, the annual report of the Commission.

(c) The Commission may appoint a secretary who, while so acting, shall not be an employee of either state. He shall serve for such term, receive such salary, and perform such duties as the Commission may direct. The Commission may employ such engineering, legal, clerical, and other personnel as in its judgment may be necessary for the performance of its functions under this Compact. In the hiring of employees the Commission shall not be bound by the civil service laws of either state.

(d) The Commission, so far as consistent with this Compact, shall have power to:

1. Adopt rules and regulations;
2. Locate, establish, construct, operate, maintain, and abandon watergaging stations, independently or in cooperation with appropriate governmental agencies;
3. Engage in studies of water supplies of the Pecos

River and its tributaries, independently or in cooperation with appropriate governmental agencies;

4. Collect, analyze, correlate, preserve and report on data as to the stream flows, storage, diversions, salvage, and use of the waters of the Pecos River and its tributaries, independently or in cooperation with appropriate governmental agencies;

5. Make findings as to any change in depletion by man's activities in New Mexico, and on the Delaware River in Texas;

6. Make findings as to the deliveries of water at the New Mexico-Texas state line;

7. Make findings as to the quantities of water salvaged and the amount thereof delivered at the New Mexico-Texas state line;

8. Make findings as to quantities of water non-beneficially consumed in New Mexico;

9. Make findings as to quantities of unappropriated flood waters;

10. Make findings as to the quantities of reservoir losses from reservoirs constructed in New Mexico which may be used for the benefit of both states, and as to the share thereof charged under Article VI hereof to each of the states;

11. Acquire and hold such personal and real property as may be necessary for the performance of its duties hereunder and to dispose of the same when no longer required;

12. Performs all functions required of it by this Compact and do all things necessary, proper or convenient in the performance of its duties hereunder, independently or in cooperation with appropriate governmental agencies;

13. Make and transmit annually to the Governors of the signatory states and to the President of the United States on or before the last day of February of each year, a report covering the activities of the Commission for the preceding year.

(e) The Commission shall make available to the Governor of each of the signatory states any information within its possession at any time, and shall always provide free access to its records by the Governors of each of the states, or their representatives, or authorized representatives of the United States.

(f) Findings of fact made by the Commission shall not be conclusive in any court, or before any agency or tribunal, but shall constitute prima facie evidence of the facts found.

(g) The organization meeting of the Commission shall be held within four months from the effective date of this Compact.

## ARTICLE VI

The following principles shall govern in regard to the apportionment made by Article III of this Compact:

(a) The Report of the Engineering Advisory Committee, supplemented by additional data hereafter accumulated, shall be used by the Commission in making administrative determinations.

(b) Unless otherwise determined by the Commission, depletions by man's activities, state-line flows, quantities of water salvaged, and quantities of unappropriated flood waters shall be determined on the basis of three-year periods reckoned in continuing progressive series beginning with the first day of January next succeeding the ratification of this Compact.

(c) Unless and until a more feasible method is devised and adopted by the Commission the inflow-outflow method, as described in the Report of the Engineering Advisory Committee, shall be used to:

(i) Determine the effect on the state-line flow of any



change in depletions by man's activities or otherwise, of the waters of the Pecos River in New Mexico.

(ii) Measure at or near the Avalon Dam in New Mexico the quantities of water salvaged.

(iii) Measure at or near the state line any water released from storage for the benefit of Texas as provided for in subparagraph (d) of this Article.

(iv) Measure the quantities of unappropriated flood waters apportioned to Texas which have not been stored and regulated by reservoirs in New Mexico.

(v) Measure any other quantities of water required to be measured under the terms of this Compact which are susceptible of being measured by the inflow-outflow method.

(d) If unappropriated flood waters apportioned to Texas are stored in facilities constructed in New Mexico, the following principles shall apply:

(i) In case of spill from a reservoir constructed in and operated by New Mexico, the water stored to the credit of Texas will be considered as the first water to spill.

(ii) In case of spill from a reservoir jointly constructed and operated, the water stored to the credit of either state shall not be affected.

(iii) Reservoir losses shall be charged to each state in proportion to the quantity of water belonging to that state in storage at the time the losses occur.

(iv) The water impounded to the credit of Texas shall be released by New Mexico on the demand of Texas.

(e) Water salvaged shall be measured at or near the Avalon Dam in New Mexico and to the quantity thereof shall be added

a quantity equal to the quantity of salvage water depleted by man's activities above Avalon Dam. The quantity of water salvaged that is apportioned to Texas shall be delivered by New Mexico at the New Mexico-Texas state line. The quantity of unappropriated flood waters impounded under paragraph (d) of this Article, when released shall be delivered by New Mexico at the New Mexico-Texas state line in the quantity released less channel losses. The unappropriated flood waters apportioned to Texas by this Compact that are not impounded in reservoirs in New Mexico shall be measured and delivered at the New Mexico-Texas state line.

(f) Beneficial use shall be the basis, the measure, and the limit of the right to use water.

## ARTICLE VII

In the event of importation of water by man's activities to the Pecos River Basin from any other river basin the state making the importation shall have the exclusive use of such imported water.

## ARTICLE VIII

The provisions of this Compact shall not apply to, or interfere with, the right or power of either signatory state to regulate within its boundaries the appropriation, use and control of water, not inconsistent with its obligations under this Compact.

## ARTICLE IX

In maintaining the flows at the New Mexico-Texas state line required by this Compact, New Mexico shall in all instances apply the principle of prior appropriation within New Mexico.

## ARTICLE X

The failure of either state to use the water, or any part thereof, the use of which is apportioned to it under the terms of this Compact, shall not constitute a relinquishment of the right to such use, nor shall it constitute a forfeiture or abandonment of the right to such use.

## ARTICLE XI

Nothing in this Compact shall be construed as;

(a) Affecting the obligations of the United States under the Treaty with the United Mexican States (Treaty Series 994);

(b) Affecting any rights or powers of the United States, its agencies or instrumentalities, in or to the waters of the Pecos River, or its capacity to acquire rights in and to the use of said waters;

(c) Subjecting any property of the United States, its agencies or instrumentalities, to taxation by any state or subdivision thereof, or creating any obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction or operation of any property or works of whatever kind, to make any payment to any state or political subdivision thereof, state agency, municipality or entity whatsoever, in reimbursement for the loss of taxes;

(d) Subjecting any property of the United States, its agencies or instrumentalities, to the laws of any state to an extent other than the extent to which such laws would apply without regard to this Compact.

## ARTICLE XII

The consumptive use of water by the United States or any of its agencies, instrumentalities or wards, shall be charged as a use by the state in which the use is made; provided, that such consumptive use incident to the diversion, impounding, or conveyance of water in one state for use in the other state shall be charged to such latter state.

## ARTICLE XIII

This Compact shall not be construed as establishing any general principle or precedent applicable to other interstate streams.

## ARTICLE XIV

This Compact may be terminated at any time by appro-

priate action of the legislatures of both of the signatory states. In the event of such termination, all rights established under it shall continue unimpaired.

## ARTICLE XV

This Compact shall become binding and obligatory when it shall have been ratified by the legislature of each State and approved by the Congress of the United States. Notice of ratification by the legislature of each State shall be given by the Governor of that State to the Governor of the other State and to the President of the United States, and the President is hereby requested to give notice to the Governor of each State of approval by the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have executed three counterparts hereof each of which shall be and constitute an original, one of which shall be deposited in the archives of the Department of State of the United States, and one of which shall be forwarded to the Governor of each State.

Done at the City of Santa Fe, State of New Mexico, this 3rd day of December, 1948.







APPENDIX B  
PROPOSED DECREE

IT IS ORDERED, ADJUDGED AND DECREED THAT

I. For purposes of this decree:

(A) "Annual Minimum Delivery Obligation" shall mean the annual amount of water owed by New Mexico to Texas under this decree over and above the Article III(a) obligation.

(B) "Index Inflow" shall mean the three year progressive average of "annual flood inflows" as those terms are defined in Tex. Exh. 79, Table 2 at page 5.

(C) "Water Interest" shall equal the return on one year treasury bills as of the date that it is determined that New Mexico has not met its obligations under this decree.

II. The State of New Mexico, its officers, attorneys, agents, and employees be and they are hereby severally enjoined:

(A) To comply with the Article III(a) obligation of the Pecos River Compact by delivering to Texas at state line each year an amount of water calculated in accordance with the inflow-outflow equation contained in Tex. Exh. 68 at page 2.

(B) To calculate the Index Inflow component of the inflow-outflow equation by using the inflow-outflow and channel loss equations **and the other procedures** contained in Tex. Exh. 79.<sup>1</sup>

(C) To deliver to Texas at state line an additional amount of water aggregating **367,700** acre feet over a period of ten years as specified in Article III of this Decree and to deliver to Texas at state line not less than **36,770** acre feet of water per year for ten years to satisfy the Annual Minimum Delivery Obligation.

---

1. Tex. Exh. 79 will have to be modified to reflect decisions by the Court as to man-made depletions chargeable to New Mexico.

III. New Mexico is granted three years from the date of this Decree to commence performance of the Annual Minimum Delivery Obligation, provided that during the three-year period she demonstrates good faith by complying with the Article III(a) obligation in each of the three years. If New Mexico fails to demonstrate such good faith, New Mexico shall commence performance of the Annual Minimum Delivery Obligation of 36,770 acre feet at the beginning of the year next ensuing after the year of default in the Art. III(a) obligation.

IV. If New Mexico shall have failed to deliver to Texas at state line at the end of five years from the date specified in Article III of this Decree 147,080 acre feet of water (being eighty percent of 183,850 acre feet of water owed by New Mexico during this five-year period), New Mexico shall pay to Texas, in addition to any amounts owed under this Decree, Water Interest on all amounts undelivered during the five-year period as well as Water Interest on the balance of the amount New Mexico owes to Texas under Section II(C) of this Decree. If New Mexico shall have failed to deliver to Texas at state line at the end of the sixth, seventh, eighth, ninth, and tenth years from the date specified in Article III of this Decree 29,416 acre feet of water (being eighty percent of 36,770 acre feet of water owed by New Mexico during each of these years), New Mexico shall pay to Texas, in addition to any amounts owed under this Decree, Water Interest on all amounts undelivered during that year as well as Water Interest on the balance of the amount New Mexico owes to Texas under Section II(C) of this Decree.

V. [If an arbiter is appointed] The Pecos River Commission, its officers and employees [or, the River Master] are enjoined to make the calculations provided for in this Decree annually as promptly as data are available and to report the calculations to appropriate representatives of the State of New Mexico and the State of Texas.



## APPENDIX C

**MINUTES OF THE COMMISSION,  
NOVEMBER 9, 1962, STIP. EXH. 4(b) at p. 257**

**[years 1950-56 omitted from the table]**

1	2	3	4	5	6	7	8
1957	182.8	229.7	48.7	77.3	92.9	-15.6	+35.6
1958	379.2	243.9	148.7	78.1	100.0*	-21.9*	+13.7
1959	191.6	251.2	54.6	84.0	103.6*	-19.6*	-5.9
1960	310.3	293.7	108.6	104.0	128.2	-24.2	-30.1
1961	211.6	237.8	57.9	73.7	96.9	-23.2	-53.3

\*The values in Columns 6 and 7 for the years 1958 and 1959 deviate slightly from those submitted to the Commission at its January 31, 1961 meeting. These small changes were brought about by minor arithmetic changes made in reviewing the flood inflow computation in these two years. It is recommended the above values be adopted as the official Commission values and replace those previously submitted.

The above table does not reflect adjustments for depletion, if any, which might have been caused below Carlsbad by pumping from the alluvium, with pumps constructed in 1947 or prior thereto. Otherwise the above findings are arrived at in the same manner as described in the January 1961 report of the Engineering Advisory Committee.

*The amounts set forth in the table below are departures caused by the training dike completed at McMillan Reservoir in 1954. In accordance with the action of the Pecos River Commission at its January 1961 meeting, these departures are not chargeable as a result of mans [sic] activities. The Engineering Advisory Committee has made no determination of what part, if any, of the remainder of the amount shown on Column 7 is so chargeable.*

	3-year Mean	Accumulation
1955 .....	2.7	2.7
1956 .....	5.3	8.0
1957 .....	8.0	16.0
1958 .....	8.0	24.0
1959 .....	8.0	32.0
1960 .....	8.0	40.0
1961 .....	8.0	48.0



(3)  
No. 65, Original

Supreme Court, U.S.  
**FILED**

DEC 20 1986

SEANOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1986

STATE OF TEXAS,

*Plaintiff,*

v.

STATE OF NEW MEXICO,

*Defendant,*

UNITED STATES OF AMERICA,

*Intervenor.*

**NEW MEXICO'S EXCEPTIONS TO THE  
REPORT OF THE SPECIAL MASTER AND  
BRIEF IN SUPPORT OF EXCEPTIONS**

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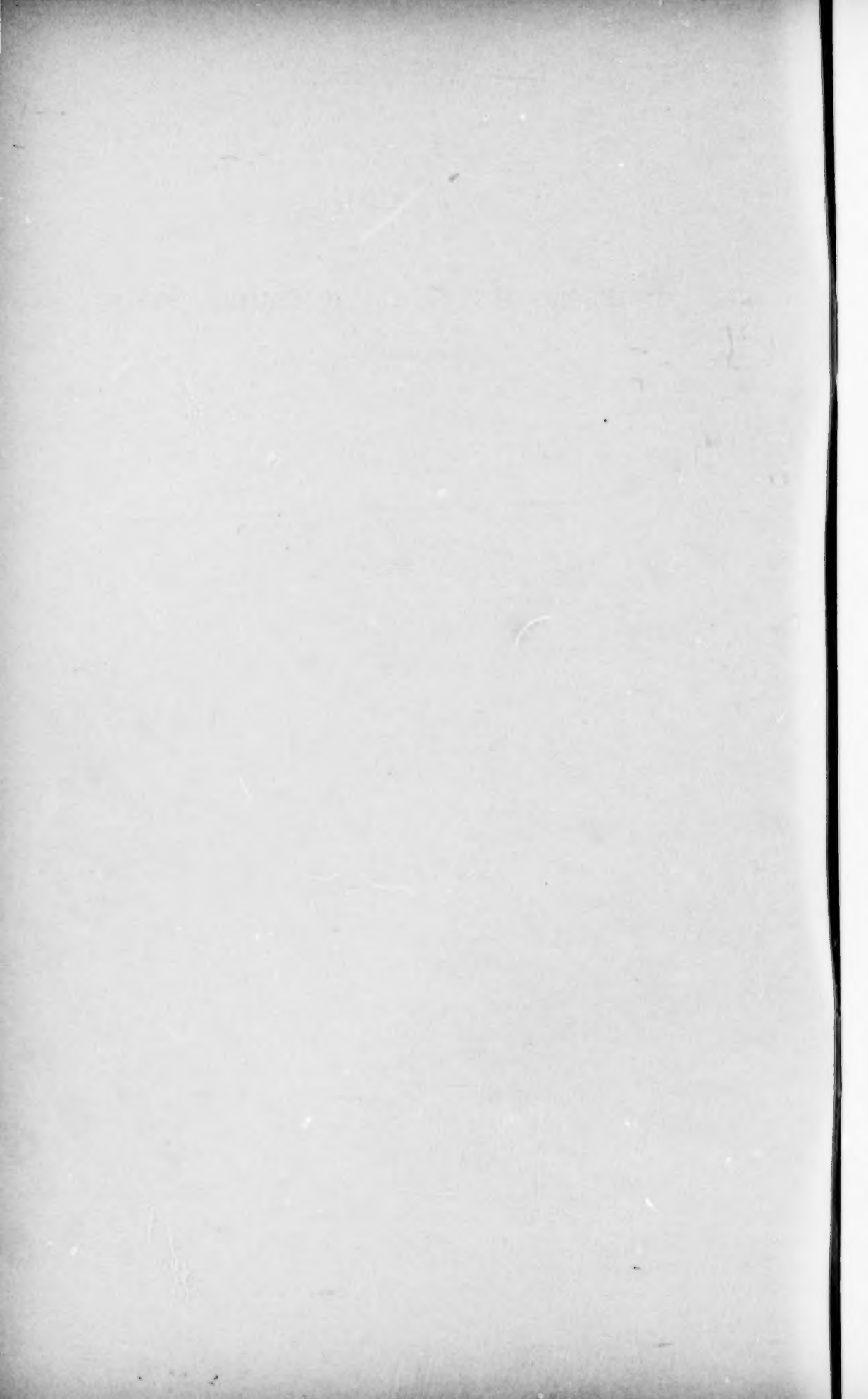
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No. 65, Original

IN THE  
**Supreme Court of the United States**

October Term, 1986

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STATE OF TEXAS,  
*Plaintiff,*

v.

STATE OF NEW MEXICO,  
*Defendant,*

UNITED STATES OF AMERICA,  
*Intervenor.*

---

**EXCEPTIONS TO THE  
REPORT OF THE SPECIAL MASTER**

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The State of New Mexico objects to the Report of the Special Master which was accepted for filing on October 6, 1986.

1. New Mexico objects to the Master's recommended finding that New Mexico depleted by man's activities 340,100 acre-feet of the flows of the Pecos River at the state line during the 34-year period, 1950-83. The Master failed to hold an evidentiary hearing on the extent to which the deficiency in stateline flows was due to man's activities in New Mexico, ignoring a critical qualification on New Mexico's obligation to deliver water under the Pecos River Compact.

2. New Mexico objects to the Master's recommended conclusion that retroactive relief is required by the Pecos River Compact. There is no express or necessarily implied covenant in the Compact requiring the payment of past delivery shortfalls, the Compact negotiators rejected delivery schedules and debit-credit accounting, and retroactive relief would be inequitable in this case.

3. New Mexico objects to the relief recommended by the Master, even if retroactive relief were permissible and appropriate in this case. The Master failed to balance the equities of the benefit to Texas and the harm to New Mexico and improperly imposed water interest payments.

New Mexico requests the Court to reject the Master's recommendations on the award of retroactive relief under the Pecos River Compact and to return the case to the Master with directions to hear evidence and make specific recommended findings on the amount of the shortfall in stateline departures caused by man's activities in New Mexico. If New Mexico's exceptions under paragraphs 2 and 3 are overruled, the Court should instruct the Master to balance the equities and determine the monetary damages that New Mexico might pay in lieu of water deliveries.

Respectfully submitted, 

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No. 65, Original

IN THE  
**Supreme Court of the United States**

October Term, 1986

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STATE OF TEXAS,  
*Plaintiff,*

v.

STATE OF NEW MEXICO,  
*Defendant,*

UNITED STATES OF AMERICA,  
*Intervenor.*

---

**NEW MEXICO'S BRIEF IN SUPPORT OF  
EXCEPTIONS TO THE REPORT OF  
THE SPECIAL MASTER**

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**QUESTIONS PRESENTED**

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1. Whether New Mexico is entitled to an evidentiary hearing on the extent to which man's activities depleted the Pecos River flow at the state line when the Pecos River Compact limits her responsibility for depletions to those caused only by man's activities in New Mexico.



2. Whether New Mexico may properly be ordered to provide retroactive relief to Texas, on an expedited basis and with the possibility of water interest, when the Compact negotiators rejected debit-credit accounting and delivery schedules under the Pecos River Compact and when the definition of the 1947 condition was not finally resolved until 1984.
3. Whether, before any retroactive relief is permitted, New Mexico is entitled to an evidentiary hearing which properly develops an adequate record on which to find an equitable remedy.

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
JURISDICTION .....	1
STATUTE INVOLVED.....	1
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT.....	12
ARGUMENT	
I. BECAUSE THE MASTER REFUSED TO HOLD AN EVIDENTIARY HEARING ON THE EXTENT TO WHICH DEPARTURES WERE DUE TO MAN'S ACTIVITIES IN NEW MEXICO, HE DEPRIVED NEW MEXICO OF THE BENEFIT OF HER BARGAIN UNDER THE COMPACT AND ERRED IN HIS RECOMMENDATION.....	14
A. Man's activities, the key determination of New Mexico's obligation, should have been the subject of a full hearing.....	14
B. The Master's presumption on man's activities is in error .....	19
C. Texas bears the burden of proving that departures are due to man's activities in New Mexico .....	23
II. RETROACTIVE RELIEF IS IMPROPER BECAUSE IT CONFLICTS WITH THE COMPACT AND IS INEQUITABLE IN THIS CASE.....	24
A. The compact commission rejected debit accounting and repayment on the Pecos River ..	24
B. Retroactive relief is inequitable in this case.....	30

	Page
III. EVEN IF RETROACTIVE RELIEF WERE PERMISSIBLE, THE TERMS OF THE RELIEF RECOMMENDED BY THE MASTER ARE IMPROPER AND SHOULD BE REMANDED FOR RECONSIDERATION . . . . .	32
A. The Master fashioned equitable relief without balancing the equities. . . . .	33
B. Requiring satisfaction of a 34-year judgment in ten years would be inequitable . . . . .	35
C. There is no basis for water interest . . . . .	39
D. New Mexico should have the option of monetary damages. . . . .	40
CONCLUSION . . . . .	41
APPENDIX	
A. Objections to Proposed Decree . . . . .	A-1
B. Pecos River Compact. . . . .	B-1
C. Texas Exhibit 79, Computation of Departures of Stateline Flows of the Pecos River from the 1947 Condition During the 1950-83 Period, Table 2 at 5 (Rev. November 18, 1985) . . . . .	C-1

## TABLE OF AUTHORITIES

Page

### CASES:

<i>Texas v. New Mexico</i> , No. 65, Original	
446 U.S. 540 (1980) . . . . .	2, 5
462 U.S. 554 (1983) . . . . .	2, 4, 5, 6, 7, 16, 17, 30, 35
467 U.S. 1238 (1984) . . . . .	5, 31
468 U.S. 1202 (1984) . . . . .	6
Special Master Report—October 3, 1977 . . . . .	28
Special Master Report—October 15,	
1979 . . . . .	2, 3, 4, 5, 18, 28
Special Master Report—October 18,	
1982 . . . . .	2, 5, 17, 31, 35
Special Master Report—February 27, 1984 . . . . .	5, 31
Special Master Draft Report—March 18,	
1986 . . . . .	9, 10, 20, 36
Special Master Report—July 29,	
1986 . . . . .	2, 6, 9, 10, 11, 22, 29, 31, 38, 39, 40
<i>Arizona v. California</i> ,	
373 U.S. 546 (1963) . . . . .	35
<i>Colorado v. Kansas</i> ,	
320 U.S. 383 (1943) . . . . .	34
<i>Colorado v. New Mexico</i> ,	
459 U.S. 176 (1982) . . . . .	34, 35
<i>Colorado v. New Mexico</i>	
467 U.S. 309 (1984) . . . . .	18
<i>Colorado Coal Furnace Distributors, Inc.</i> ,	
<i>v. Prill Mfg. Co.</i> ,	
605 F.2d 499 (10th Cir. 1979) . . . . .	30
<i>Kansas v. Colorado</i> ,	
206 U.S. 46 (1907) . . . . .	34
<i>Nebraska v. Wyoming</i> ,	
325 U.S. 589 (1945) . . . . .	34, 35
<i>Pierce v. United States</i> ,	
255 U.S. 398 (1921) . . . . .	39

<i>Tyrell v. Dobbs Investment Co.</i> ,	Page
337 F.2d 761 (10th Cir. 1964) . . . . .	19
<i>Virginia v. West Virginia</i> ,	
238 U.S. 202 (1915) . . . . .	39
<i>Wyoming v. Colorado</i> ,	
309 U.S. 572 (1940) . . . . .	31, 32

## CONSTITUTION AND STATUTES:

United States Constitution, Article III . . . . .	1
28 U.S.C. § 1251(a) . . . . .	1
Pecos River Compact,	
63 Stat. 159 (1949); N.M. Stat. Ann.	
§ 72-15-19 (1978); Tex. Water Code Ann.	
§ 43.010 (Vernon 1972) . . . . .	<i>passim</i>
Article II . . . . .	8
Article III . . . . .	3, 4, 7, 10, 14, 26, 27, 29
Article VI . . . . .	5
Article IX . . . . .	10, 26, 29, 31
Arkansas River Compact,	
63 Stat. 145 (1949) . . . . .	30
Rio Grande Compact,	
53 Stat. 785 (1939) . . . . .	27, 30
Sabine River Compact,	
65 Stat. 736 (1951) . . . . .	30
Upper Colorado River Compact,	
63 Stat. 31 (1949) . . . . .	30

## OTHER AUTHORITIES:

Council of State Governments, <i>Interstate</i>	
<i>Compacts and Agencies</i> (1979) . . . . .	30
Dunbar, "Pioneering Groundwater	
Legislation" 47 <i>Pacific Hist. Rev.</i>	
565 (1978) . . . . .	30



	Page
National Resources Planning Board, <i>The Pecos River Joint Investigation</i> (1942), Stip. Exhibit 11(b) . . . . .	2, 11
S. Doc. No. 109, 81st Cong., 1st Sess. (1949), Stip. Exhibit 1 . . . . .	<i>passim</i>
S.J. Res. 155, 84th Cong., 2d Sess. (1956) . . . . .	2, 3
S. Rep. No. 192, 85th Cong., 1st Sess. (1957). . . . .	2, 3

# **EXHIBITS:**

New Mexico Exhibit 128. . . . .	36
New Mexico Exhibit 133. . . . .	36
New Mexico Exhibit 134. . . . .	36
New Mexico Exhibit 136. . . . .	29, 37, 38
Texas Exhibit 19. . . . .	22
Texas Exhibit 79. . . . .	9, 19, 20, 21, 22, 23, 28
Stip. Exhibit 4(b), Pecos River Commission Minutes January 31, 1961 . . . . .	5
November 9, 1962. . . . .	7, 9, 16, 22
Stip. Exhibit 7, Pecos River Commission Transcripts, November 9, 1962. . . . .	22
Stip. Exhibit 8, Report on Review of Basic Data (October 18, 1960) . . . . .	5, 22
Master's Exhibit 2 . . . . .	8, 17
Master's Exhibit 3 . . . . .	8, 17



## JURISDICTION

The original jurisdiction of the Court was invoked and exists under Article III, section 2, clause 2 of the Constitution of the United States and 28 U.S.C. § 1251(a).

## STATUTE INVOLVED

The Pecos River Compact, 63 Stat. 159 (1949), N.M. Stat. Ann. § 72-15-19 (1978) and Tex. Water Code Ann. § 43.010 (Vernon 1972). A copy of the Pecos River Compact is in the appendix to this brief at page B-1.

## STATEMENT OF THE CASE

1. In 1948 the states agreed to define and limit New Mexico's obligation under the Compact by "man's activities" in New Mexico.

The Pecos River Compact of 1948 (Compact) was a compromise: Texas bargained for and got the "1947 condition" allocation and New Mexico bargained for and got the "man's activities" protection. A federal representative explained to Congress:

The compact reflects a compromise . . . . On the one hand, New Mexico has agreed to settlement on the basis of '1947 conditions' . . . . This is offset by the agreement of Texas that nonbeneficial consumptive use of water, due to non-man-made activities, would not be chargeable against New Mexico in determining her obligation to deliver water at the New Mexico-Texas State line.

Letter from Acting Secretary of the Interior in S. Doc. No. 109, 81st Cong., 1st Sess. xv (1949) (S. Doc. 109) Stip. Exhibit 1.

New Mexico thus agreed that Texas would continue to receive the same proportion of water she had received under the "1947 condition" in exchange for Texas' commitment not to hold New Mexico liable for any excess depletions unless those depletions were due to man's activities in New Mexico. New Mexico bargained for this limitation, determining her responsibility in terms of man's activities because she did not wish to risk or bear responsibility for the depletions due to natural or undefined causes on the Pecos River. The Pecos River has long been recognized as extraordinarily difficult:

For its size, the basin of the Pecos River probably presents a greater aggregation of problems associated with land and water use than any other irrigated basin in the western United States.

National Resources Planning Board, *The Pecos River Joint Investigation* at vi (1942), Stip. Exhibit 11(b).

Royce J. Tipton, an internationally known consulting engineer who was chairman of the Engineering Advisory Committee to the negotiating commission and engineer advisor to the United States commissioner, told Congress in 1956 that the Pecos River, although small, "has all the problems that a big river ever had and has some . . . peculiar unto itself."<sup>1</sup>

The Pecos was and still is a difficult river. First, its flow is extremely variable; the normal basic flow is entirely lost and re-established many times in the length of the stream. Stip. Exhibit 11(b) at 12; October 18, 1982 Special Master Report (1982 Report) at 6; October 15, 1979 Special Master Report (1979 Report) at 5-6, *confirmed*, *Texas v. New Mexico*, 446 U.S. 540 (1980); *Texas v. New Mexico*, 462 U.S. 554, 557 n.2, 574 (1983); July 29, 1986 Special Master Report (1986

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<sup>1</sup> Hearings on S.J. Res. 155 Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 84th Cong., 2d Sess. 8 (1956). *See also* S. Doc. 109 at 2; S. Rep. No. 192, 85th Cong., 1st Sess. 4 (1957).

Report) at 31 n.12. Second, depletion at any given point on the stream is not related in direct proportion to the irrigation above that point:

As irrigation in a basin increases, more and more of the water formerly lost by natural processes is converted to beneficial use. Conversely, if irrigated areas are abandoned, the accretion to the stream at some point below the abandoned area will not be equal to the amount of water that was being consumed by the area at the point of use. This again is due to natural losses.

S. Doc. 109 at xxxiv.

Third, the Pecos River sits in a basin that is geologically, as well as hydrologically, complex. 1979 Report at 5-6. Fourth, it has numerous natural problems: frequent flooding, recurring drought, decreasing tributary inflow, poor water quality, sedimentation and large nonbeneficial uses of water by water-loving plants. S. Doc. 109 at 2; S.J. Res. 155 *supra* at 8; S. Rep. No. 192 *supra* at 4. Finally, the river is constantly changing: "Since white man has known the Pecos River, conditions on it have never been static. They have been in a continual state of flux." S. Doc. 109 at xxv, 3.

New Mexico sought to protect herself from the river's vagaries so that she would never be held liable for shortfalls to Texas unless New Mexico users were in fact responsible. To accommodate the bargain reached, the Pecos River Compact expresses the resulting water allocation under the 1947 condition in terms of man's activities:

New Mexico shall not *deplete by man's activities* the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition.

Article III(a) (emphasis added).



2. **Twenty-six years after the 1948 agreement Texas sued New Mexico claiming the water she had received during the preceding 23 years fell short of the 1947 condition by 1.2 million acre-feet.**

In 1974 Texas repudiated all previous work, agreements and actions of the Pecos River Commission and filed suit in this Court claiming she had suffered a water shortfall from 1950 through 1972 of 1.2 million acre-feet. Texas' Complaint Par. V at 4 (June 26, 1974). For 15 or 20 years, the Pecos River Commission had functioned as contemplated in the Compact. This Court's previous opinion, 462 U.S. at 560-62, provides a comprehensive factual history of the administrative proceedings. *See also* the 1979 Report at 26-30. During the 1960s, discord grew and cooperation between the states came to an end. 462 U.S. at 561 & n.9. As former Special Master Judge Breitenstein remarked of this period, "a cold reading of the minutes disclosed to me a complete lack of desire on the part of Texas to agree to anything that New Mexico wanted." Tr. at 320 (June 28, 1977).

The litigation that Texas filed fell into three phases corresponding to the terms of the water allocation in Article III(a) of the Pecos River Compact:

- the determination of the 1947 condition;
- the determination of departures from the 1947 condition; and
- the determination of the extent to which those departures were caused by "man's activities" in New Mexico.

- a. **Phase I: Redefining the 1947 condition took ten years.**

The Pecos River Compact set the basic allocation of water by the 1947 condition rather than by a fixed amount, percentage, or schedule of measured flow. The intent was to give Texas in the future essentially the same proportion of water

she had received under the 1947 condition, that is, to maintain the status quo as to depletions in man's activities in New Mexico. To define the 1947 condition, the states had prepared a reach-by-reach routing study using the inflow-outflow method. S. Doc. 109 at (Face p. 72) No. 5. Because they recognized the method might contain errors or be improved in the future, the states provided that the Pecos River Commission would have full authority to change the method or perfect the techniques or data. Compact Articles VI(a), VI(b), and VI(c); S. Doc. 109 at 117, 150-51; 462 U.S. at 574. The Commission used that authority to review and correct the basic data. Stip. Exhibit 4(b) at 247, January 31, 1961 Commission Minutes; Stip. Exhibit 8, Report on Review of Basic Data (Review of Basic Data) (October 18, 1960).

When Texas filed suit, she first argued in favor of using the data and relationships presented in S. Doc. 109. 1979 Report at 36. The Master and the Court rejected that approach. *Id.* at 41, *confirmed*, 446 U.S. 540. Texas next challenged some of the Commission's corrections to the data. February 27, 1984 Special Master Report (1984 Report) at 7-9, E-2. When only five disputed issues remained, Texas switched her approach and asked the court to abandon the inflow-outflow method presented by the Compact and impose an entirely new method known as double mass analysis. Tr. at 3348-49, 3366-67 (July 27, 1981); Tr. at 3483 (December 21, 1981). The Master and the Court rejected the double mass analysis. 1982 Report at 21, *adopted*, 462 U.S. at 574. The Court returned the matter to the Master, who determined the remaining unresolved issues to define the 1947 condition in 1984. His January 24, 1984 report was approved. *Texas v. New Mexico*, 467 U.S. 1238 (1984).

Ten years after the suit began, the 1947 condition was finally defined.

**b. Phase II: Determining the departures from the 1947 condition was largely mechanical.**

When this Court returned the case to the Master in 1983, the Court noted that, following final definition of the 1947 condition, two issues remained to determine whether New Mexico had fulfilled her Compact obligations. The first issue was the departures from the 1947 condition: "under the proper definition of the '1947 condition' . . . what is the difference between the quantity of water Texas could have expected to receive in each year and the quantity it actually received?" 462 U.S. at 575.

The determination of departures from the 1947 condition was expected to be a relatively mechanical application of established procedures. A new Master assumed responsibility for this portion of the case; Judge Breitenstein resigned and Charles J. Meyers took his place. *Texas v. New Mexico*, 468 U.S. 1202 (1984). As Special Master Meyers noted, the states successfully stipulated to most of the factual issues quantifying departures. 1986 Report at 2-3. The few controversies remaining over adjustments to the departures were heard in November and December 1985.

The Master then determined that the difference between the quantity of water Texas could have expected to receive under the 1947 condition from 1950 through 1983 and the quantity she actually received amounted to 425,500 acre-feet. The Master found that 340,100 acre-feet of this departure were chargeable to New Mexico. 1986 Report at 31. This departure for the 34-year period averages 10,000 acre-feet per year. The amount Texas had claimed as a departure at the outset of the suit for a 23-year period averages 52,200 acre-feet per year. The process for determining departures had taken one and one-half years. New Mexico does not contest the Master's recommended finding of 340,100 acre-feet in departures.

- c. **Phase III: The final issue, the extent to which man's activities caused the departures, was not heard but instead presumed.**

The final determination under the Compact is the finding on the extent to which departures were caused by man's activities in New Mexico. The key to the compromise New Mexico reached with Texas in 1948 was the limiting language "deplete by man's activities." This Court recognized it as a "critical qualification on New Mexico's obligation to deliver water under Art. III (a) of the Compact." 462 U.S. at 573 n.20.

There had never been a determination under the Compact that any departures from the 1947 condition were due to man's activities. The Pecos River Commission never made such a determination.<sup>2</sup> Special Master Breitenstein did not consider this issue. Special Master Meyers' Report gives the Court no foundation for determining the issue.

The Compact is clear. It defines "deplete by man's activities" as beneficial consumptive use.

The term "deplete by man's activities" means to diminish the stream flow of the Pecos River at any given point as the result of beneficial consumptive uses of water within the Pecos River Basin above such point. For the purposes of this Compact it does not include the diminution of

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<sup>2</sup> In 1961 and 1962 the Commission made findings of the departures in stateline flows from the 1947 condition. Using the Review of Basic Data, the Commission found a negative departure of 53,300 acre-feet for the 1950-61 period. The Commission found that 48,000 acre-feet were caused by the McMillan Dike, but that these departures were not chargeable as a result of man's activities. The Commission did not find, or in any way imply, that the balance of 5,300 acre-feet was attributable to man's activities in New Mexico. Stip. Exhibit 4(b) at 256-57 (Commission minutes of November 9, 1962).

such flow by encroachment of salt cedars or any other like growth, or by deterioration of the channel of the stream.

Article II(e).

Royce Tipton offered further explanation of beneficial consumptive use in the legislative history:

Beneficial consumptive use of water from a technical standpoint includes the amount of water that is actually burned up by the transpiration of crops raised by man; reservoir evaporation; the evaporation from the water surface of canals; the slight amount of transpiration by native vegetation along the canals; the loss of water due to seeped areas adjacent to the area irrigated by man.

S. Doc. 109 at 112.

Despite the lack of procedural precedents, both states had anticipated from the outset of the litigation that there would be a trial segment to determine the extent to which departures, if any, were due to man's activities. *See* Master's Exhibit 2 at 4 (the May 31, 1979 letter from Richard A. Simms, attorney for New Mexico, to the Master) and Master's Exhibit 3 at 2 (the June 1, 1979 letter from Douglas Caroom, attorney for Texas, to the Master), on the schedule for the rest of the case.

Special Master Meyers also apparently contemplated a hearing on man's activities and invited the states to submit briefs on who bore the burden of proving whether and to what extent man's activities in New Mexico had caused the departures. May 22, 1985 Order. The Master did not, however, issue an order addressing these matters. Instead he set for hearing in November and December 1985 the few remaining disputes on adjustments to calculations of departures from the 1947 condition for those uses not chargeable to New Mexico.



October 10, 1985 Pretrial Order. He did not set a hearing on man's activities, the factual questions on beneficial consumptive uses in New Mexico.

"Adjustments" include those items which are easily identified as not chargeable to New Mexico and which must be made to the gross departures determined by Texas Exhibit 79 before an investigation regarding causes of departures is undertaken. The Pecos River Commission had previously determined that any stateline departures caused by the McMillan Dike and Malaga Bend would not be charged to New Mexico as depletions by man's activities. Stip. Exhibit 4(b) at 231, 238-39 (Commission minutes of January 31, 1961); *id.* at 256-57 (Commission minutes of November 9, 1962). The third adjustment was for the reach of the river above Alamogordo Dam, an adjustment which was necessary to include the entire river in New Mexico in the computation of departures at the state line. New Mexico's proposed adjustment to account for reductions of flow at Carlsbad Springs, which cannot be due to man's activities in New Mexico, was rejected by the Master. 1986 Report at 29. Once adjustments to gross departures are made, the net departures at the state line must be investigated to determine which, if any, are due to man's activities in New Mexico.

Following the November-December 1985 hearing, the Master issued a draft report in which he addressed not only the second phase of the litigation, the departures from the 1947 condition, but also the third phase, the extent to which the departures were due to man's activities. March 18, 1986 Special Master Draft Report (Draft Report). The Master decided that Texas Exhibit 79, which reflected both states' stipulations on calculated departures and was the basic analytical tool for the second phase, presumptively justified a conclusion that all remaining departures were due to man's activities. *Id.* at 9. The Master therefore has recommended that the Court find the entire 340,100 acre-foot shortfall from 1950 through 1983 due



to man's activities in New Mexico. 1986 Report at 31. New Mexico takes exception to this recommendation.

- d. Relief: The Master further recommends not only prospective injunctive relief against New Mexico, but also retroactive relief, expedited and with the possibility of water interest.**

The Master's draft report following the November-December 1985 hearing addressed not only the second phase, departures, and the third phase, man's activities, but went on to address remedy and relief. It proposed to recommend prospective relief, expedited retroactive relief and water interest. Draft Report at 30-31. The issue of appropriate relief had not been previously briefed or tried in this case and, in fact, the retroactive relief issue was not briefed until June 1986. New Mexico's Legal Memorandum on Relief under the Pecos River Compact (June 10, 1986). The Pecos River Compact does not specify relief other than corrections to meet future obligations. *See* Compact Article IX; S. Doc. 109 at 124.

The Master acceded to New Mexico's request for a hearing on relief. Following the two-day hearing in May 1986, the Master essentially confirmed his earlier proposal and recommended that the Court enjoin New Mexico to:

- (a) meet her Article III(a) obligation under the Pecos River Compact each year;
- (b) deliver to Texas at the state line an additional amount of water "aggregating" 340,100 acre-feet over a period of ten years, with an "Annual Minimum Delivery Obligation" each year of 34,010 acre-feet in addition to the amount required by Article III(a); and
- (c) pay water interest to Texas on the balance of the amount of water owed if New Mexico does not make

a good faith attempt to meet the "Annual Minimum Delivery Obligation" of 34,010 acre-feet specified above. 1986 Report at 36 and Proposed Decree, Article II, at A-1.

This ten-year period for expedited retroactive relief would compel New Mexico to curtail virtually all irrigation, municipal and other groundwater rights in the Roswell Basin, as well as all other junior uses outside of the Roswell Basin and within the Pecos River basin for at least ten years. Tr. at 39-41 (May 20, 1986). It is uncertain how many acres irrigated in Texas would benefit from this relief or how much they might be benefitted, because of the intrusion of high salinity waters in the river above the state line, which increases the water requirements of crops, and channel and distribution losses below the state line. S. Doc. 109 at 4; Stip. Exhibit 11(b) at 4.

New Mexico takes exception to the Master's recommendation to require retroactive relief for departures from the 1947 condition during the 34 years from 1950 through 1983. In addition, as previously noted, New Mexico takes exception to the Master's recommendation that all departures be deemed due to man's activities in New Mexico.

## SUMMARY OF ARGUMENT

New Mexico objects to the conclusions reached by the Master regarding New Mexico's delivery obligation under the Pecos River Compact and to the procedural inadequacies of the hearings below.

The Master erred by refusing to hear evidence on the critical element under the Pecos River Compact which defines New Mexico's delivery obligation to Texas: the extent to which any negative departures from the 1947 condition were caused by man's activities in New Mexico. His failure to hear evidence on causes of departures was based on two faulty assumptions. First, he erroneously concluded that the procedures used to compute the stateline departures also determine departures caused by man's activities in New Mexico. It is not possible to determine New Mexico's obligation only by reference to indicated stateline departures. Second, by relying solely on those procedures, he failed to require Texas to bear the burden of proof on her complaint that New Mexico breached the Compact. Thus, the Master cut short the proceedings below by relying on incorrect assumptions. His reliance is contrary to the basis of the bargain struck by the states in which Texas agreed to receive an amount of water equivalent to that she received under the 1947 condition and New Mexico would bear responsibility only for those departures which were due to man's activities over and above the 1947 condition.

The Master erred by requiring retroactive relief for the accumulated departures and by imposing water interest on undelivered amounts of water. Retroactive relief is improper. First, the Compact negotiators clearly rejected an accounting system which required delivery schedules and accumulated water debits and credits. The only remedy allowed under the Compact is the curtailment of beneficial consumptive use of water in New Mexico to increase stateline flows to a level

equivalent to the flows of the Pecos River under the 1947 condition. Second, New Mexico should not be held responsible for an obligation which was uncertain and not defined until 1984. Third, there is no legal authority to impose water interest under the Compact.

The Master further erred in his recommendation that a ten-year schedule be used to pay the departures which were accrued over 34 years. He failed to develop an adequate record upon which the equities between New Mexico and Texas may be properly balanced. While New Mexico presented evidence of substantial economic harm, Texas failed to demonstrate in concrete terms her past economic losses and the benefits she would expect to receive from the delivery of 34,010 acre-feet each year for ten years. The Master also improperly refused to allow New Mexico the option of monetary payment for any past shortfalls in delivery.

**ARGUMENT****I**

**BECAUSE THE MASTER REFUSED TO HOLD  
AN EVIDENTIARY HEARING ON THE EXTENT  
TO WHICH DEPARTURES WERE DUE TO  
MAN'S ACTIVITIES IN NEW MEXICO, HE DEPRIVED  
NEW MEXICO OF THE BENEFIT OF HER  
BARGAIN UNDER THE COMPACT AND  
ERRED IN HIS RECOMMENDATION**

- A. Man's activities, the key determination of New Mexico's obligation, should have been the subject of a full hearing.**

The Master skimmed over the key determination under the Compact, and in so doing, deprived New Mexico of the protection for which she had bargained under the Compact without an evidentiary hearing. Designating man's activities as the ultimate finding under the Compact was the foundation for New Mexico's agreement to Texas' apportionment terms. All 12 years of this litigation have been devoted to the definition of the 1947 condition and the computation of departures. When it came to the key element protecting New Mexico, the finding of the extent to which the departures were due to man's activities in New Mexico, the Master passed by swiftly. He simply made a presumption against New Mexico and bolstered it with subsequent testimony from a Texas witness. The Master should have held a hearing in which Texas bore the burden to prove the extent to which the 340,100 acre-feet of departures were due to man's activities in New Mexico.

New Mexico had bargained for the protection contained in defining New Mexico's responsibility in terms of man's activities in New Mexico. In 1948 New Mexico agreed that Texas could have water under the 1947 condition in exchange for Texas' agreement that New Mexico would be responsible only for

depletions due to man's activities in New Mexico S. Doc. 109 at 97 (Compact Commission meeting of November 13, 1948); *id.* at 125 (Compact Commission meeting of December 3, 1948). New Mexico had negotiated for that limitation to protect herself from the indeterminate causes of departures and the vagaries of the Pecos River. *Id.* at 116-17.

The negotiators consequently structured the apportionment under the Compact in terms of man's activities, and established the sole basis of New Mexico's obligation as follows:

New Mexico shall not deplete by *man's activities* the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition.

Article III(a) (emphasis added).

Had the negotiators intended that all departures be attributed to New Mexico, they could have drafted the language accordingly and the Compact would have been much simpler. Had they intended New Mexico to be responsible for all departures except for those due to channel deterioration and water-loving plants, they could have so specified and the Compact would still have been simpler. The Compact negotiators, however, did not express New Mexico's obligations in those terms, but rather in terms of an affirmative finding of the extent to which man's activities caused the departures. That was the agreement of the parties.

The Compact history makes it plain that depletion due to "man's activities" is a separate and critical finding. At the final compact commission meeting, Royce Tipton explained the Compact and it was adopted "subject to [his] explanation." S. Doc. 109 at 114, 119, 121, 126, 127. Mr. Tipton pointed out that the Commission should determine departures from the



1947 condition and then "determine the extent to which that depletion was due to man's activities in New Mexico . . . ." *Id.* at 125.

Those administering the Compact viewed New Mexico's obligation the same way. The Pecos River Commission made determinations of departures from the state line from 1950 to 1961. Stip. Exhibit 4(b) at 256-57 (Commission minutes of November 9, 1962). It determined the departures to be 53,300 acre-feet. The Commission did not then assume New Mexico was responsible for the departures. Instead, the Commission adjusted the departures by 48,000 acre-feet, the effect of the construction of the McMillan Dike on stateline flow, which the Commission had previously found should not be chargeable to New Mexico. At that point, 5,300 acre-feet in departures remained. Even then the Commission did not find, or in any way imply, that the remainder was due to man's activities in New Mexico; the Commission did not ask New Mexico to adjust its delivery at the state line.

When the Court remanded this case to the Master in 1983, the Court noted, as indicated above, that, after final determination of the 1947 condition, two issues remained before New Mexico's obligation could be defined. The first was the determination of departures from the 1947 condition, discussed above. The second was: "to what extent were the shortfalls due to 'man's activities in New Mexico?'" 462 U.S. at 575. The Court cautioned that the determination of man's activities was separate from, and not determined by, the previous analyses:

It deserves emphasis that neither the Inflow-Outflow Manual in any of its past or projected versions nor the Texas 'Double Mass Analysis' has anything to say about whether a particular shortfall in state-line water deliveries is due to 'man's activities' . . . . At best, correlation curves

for sub-reaches of the river can be helpful in identifying *where* a shortfall seems to originate.

*Id.* at 573 n. 20.

The states had anticipated an evidentiary hearing on, and a separate consideration of, man's activities, as had the previous Master. Tr. at 323 (June 28, 1977); October 31, 1977 Pre-Trial Order Par. 5(a)(6) at 6. That Texas understood the bargain it had made with New Mexico is clear from the record. Texas repeatedly referred to the need to determine the extent to which departures are due to man's activities in a separate phase of the trial after the determination of departures. In 1979 Texas noted:

Even after a pattern of departures from the established relationship develops, one final step remains to determine New Mexico's compliance or noncompliance with the Compact's requirements. It must be determined that the departure is caused by man's activities rather than natural causes.

Texas' Objections to the Report of the Special Master at 6 (November 28, 1979).

Counsel for Texas on another occasion noted that, once a departure trend was established, the next task would be to "go back and then determine whether or not the underdeliveries were caused by man's activities or not . . . ." Tr. at 687 (March 1, 1978). That determination would be made by a reach-by-reach analysis of the river. S. Doc. 109 at 156. Both states included a hearing for man's activities in their proposed schedules in 1979. Master's Exhibit 2 at 4; Master's Exhibit 3 at 2; *See also* 1982 Report at 19.

Special Master Meyers, however, gave short shrift to this stage of the proceedings. Having decided upon the departures

and adjustments to the departures, he saw no need to spend time and resources completing the detailed factual determination of the extent to which the remaining departures were due to man's activities in New Mexico. He simply presumed New Mexico liable for the remainder, after noting New Mexico had previously introduced no evidence on the issue. Tr. at 240-41 (May 20, 1986); Tr. at 347-49 (May 21, 1986).

The Master's action and recommendation cuts the heart out of the bargain New Mexico struck with Texas and, as the first determination on man's activities, sets a precedent dissolving the protection New Mexico had negotiated for her people in 1948. New Mexico never agreed to a Compact under which the risk of the Pecos River's variability and indeterminates would become her burden. By negotiating for an obligation defined in terms of man's activities, she sought to reduce the likelihood that New Mexico water users would be shut down to compensate for non-manmade losses on the river. She intended "hard facts, not suppositions or opinions," to be the basis of any curtailment of water use in New Mexico. See *Colorado v. New Mexico*, 467 U.S. 309, 320-21 (1984).

The Master did not probe the hard facts but, rather, skated quickly to decision. Although the Master's emphasis on efficiency is understandable, speedy resolution is less significant in this context than a resolution which will eliminate or reduce further difficulties. The context is one of decades of difficulties. Disputes over the Pecos River have flared up repeatedly for at least 60 years. 1979 Report at 10. This litigation has so far consumed 12 years which have been principally devoted to establishing the 1947 condition. Given this history, the Master's refusal to hear evidence and direct Texas to present evidence on man's activities is particularly dissonant and troubling. The Compact embodies the expectations of the states who bound themselves to it, and its key provision on obligation is worthy of a more considered interpretation.

Because of the Master's decision, New Mexico has thus far been deprived of the benefit of her bargain. The key procedural step under the Compact has been condensed to the point of virtual elimination. The Master acted improperly and in violation of the Compact by deciding man's activities on the basis of a presumption.

**B. The Master's presumption on man's activities is in error.**

The Master's proposed finding that the remaining departures were due to man's activities in New Mexico rests on a double assumption: first, that all natural causes of departures had been accounted for in the computation of departures in Texas Exhibit 79, and, second, that the remaining departures in Texas Exhibit 79 were necessarily due to man's activities. Both assumptions, as well as the process used to reach them, are wrong. See *Tyrell v. Dobbs Investment Co.*, 337 F.2d 761, 765 (10th Cir. 1964) ("pyramiding or imposition of one inference upon another to establish the facts necessary to [a] case" is "not permissible and amounts to mere speculation").

Texas Exhibit 79 does not distinguish between departures due to natural causes and those due to man's activities. It was created for and limited to computations of departures. It does not resolve the question whether departures were caused by man's activities. Although Texas' witness later readily agreed with the Master that Texas Exhibit 79 accounted for all natural causes of departure, Tr. at 317-18 (May 21, 1986), the history of Texas Exhibit 79 belies that understanding.

Texas prepared Exhibit 79 to compute departures as required by the Master's December 10, 1984 Pretrial Order. When Texas called its first version of Exhibit 79 "New Mexico's Delivery Obligation 1950-1983" (February 15, 1985), New Mexico promptly objected to the inference in the title that calculated departures represented her delivery obligation and Texas

changed the title to "Computations of Departures of Stateline Flows of the Pecos River from the 1947 Condition During the 1950-83 Period" (August 15, 1985). *See* New Mexico's Preliminary Report on the State of Texas' February 15, 1985 submittal at 3-4 (March 15, 1985).

After further changes and additional stipulations between the states, Texas offered Texas Exhibit 79 at the December 1985 hearing. Tr. at 103 (December 3, 1985). The exhibit did not state, nor did any previous versions state, that the computations were intended to account for all non-manmade depletions. Texas did not offer testimony to the effect that Exhibit 79 accounted for all non-manmade depletions. The exhibit was received into evidence simply as a computation of departures and New Mexico, on that basis, made no objection.

The Master's March 18, 1986 Draft Report for the first time interpreted Texas Exhibit 79 to account for all non-manmade depletions. Draft Report at 9. The Master's interpretation departed from the course of dealings between the states on Texas Exhibit 79, the purpose of the exhibit and its language.

At oral argument on objections to the Master's draft report, New Mexico pointed out that there must be, but was not, evidence in the record to support the Master's inference from Texas Exhibit 79. The Master stated that he would be on "safe ground" if it had been testified that Texas Exhibit 79 accounted for all natural flows and that anything not accounted for was man-made departures. Tr. at 60 (April 16, 1986).

The Master's interpretation of Texas Exhibit 79 was apparently as much of a surprise to Texas as New Mexico. In the subsequent hearing on remedies, Robert Whinton, the Texas Interstate Compact Coordinator and engineering advisor to the Texas commissioner on the Pecos River Commission, testified that Exhibit 79 did not account for depletions due to man's activities or for every natural depletion in the river. Tr. at



247-53, (May 20, 1986); *see also* Tr. at 282-83, 305 (May 21, 1986). The next day, Mr. Whintenton testified again. This time, after additional exchanges between the witness, counsel and the Master, Mr. Whintenton agreed with the Master that it was "more likely than not" that the negative departures reflected in Texas Exhibit 79 were due to man's activities. *Id.* at 290-92. He asserted, however, that Texas was ready and willing to present evidence to show that all departures were caused by man's activities. *Id.* at 306-07.

After hearing Mr. Whintenton's testimony on the first day, the Master asked Texas to put on another witness to address the issue. Tr. at 252, 254-55 (May 20, 1986). Texas offered Dr. V.R. Krishna Murthy, who testified that Texas exercised its "best efforts" to account for all natural losses in the stream system and that all "known" natural losses were accounted for in Texas Exhibit 79. Tr. at 318, 319 (May 21, 1986). Dr. Murthy also agreed with the Master that, as a "logical proposition," additional losses are "more likely than not" due to man's activities. *Id.* at 320. The theory that Texas Exhibit 79 addresses causes of departures was plainly an afterthought prompted by the Master's draft report.

New Mexico's expert witness was Carl Slingerland, a 25-year member of the Commission's engineering advisory committee. He testified that Texas Exhibit 79 merely computed indicated departures, and, although some items used to compute departures reflected reductions not due to man's activities, the exhibit did not identify causes of departures. *Id.* at 340-43. When asked whether it was more likely than not that negative departures were caused by man's activities, he said he would expect part of them were due to man's activities and part were not. *Id.* at 345. He estimated that probably 15 to 20 percent of the stateline flow was lost due to causes other than man's activities. *Id.* at 343.



The Master, therefore, was in error in assuming that Texas Exhibit 79 addresses causes and accounts for all non-manmade depletions. The Master further erred in assuming that, if Exhibit 79 accounted for all non-manmade depletions, all remaining departures must be due to man's activities.

In addition to man-made causes and known natural causes of depletion, the Pecos River has suffered losses from indeterminate causes. There had been, for example, two substantial declines in the discharge of water from Carlsbad Springs to the Pecos River. The first occurred in 1933 and the engineering advisors to the Pecos River Commission were never able to determine the cause. The second occurred in 1957. Stip. Exhibit 8, Review of Basic Data, figure 15-1. Only 16,000 acre-feet per year of the reduction in discharge from Carlsbad Springs could be attributed to man's activities in New Mexico. Texas Exhibit 19, "Geohydrology of Major Johnson Springs and Carlsbad Springs," figure 10, (1978). As to the remaining 15,000 acre-feet per year decline in discharge, the Master determined that none of this depletion could be attributed to pumping in Texas. 1986 Report at 29. There was no evidence that this departure could be attributed to man's activities in New Mexico.

At the 1961 and 1962 meetings of the Commission, Royce Tipton emphasized to the Commission that there had been a sudden break from a trend of accumulated positive departures in 1957 and said that the engineering advisory committee should address its attention to the cause of that departure. Stip. Exhibit 4(b) at 247 (Commission minutes of January 31, 1962); Stip. Exhibit 7, Tr. at 60 (Commission meeting of November 9, 1962). No activity of man in New Mexico, not dramatically evident, could have caused such a substantial decline in the discharge of Carlsbad Springs. This departure has never been explained and therefore cannot be ascribed to man's activities in New Mexico.

The Master took no account of the indeterminate causes. Yet historic evidence of unknowns makes it clear that a reach-by-reach investigation of the river and independent determination of causes, as contemplated by the Compact negotiators, is needed before New Mexico may be fairly charged for depletions. Neither the hearings in November and December 1985 nor the May 1986 hearing on relief provided a basis for or bolstered the Master's erroneous double assumptions about Texas Exhibit 79.

**C. Texas bears the burden of proving that departures are due to man's activities in New Mexico.**

New Mexico is entitled to an evidentiary hearing on man's activities, in which Texas bears the burden of proving that departures are caused by man's activities in New Mexico. As early as 1977, Special Master Breitenstein had decided:

So far as depletion by the activities of man are concerned, it is my opinion that the burden is on the State of Texas to show that the depletion, departures, whatever you want to call them, have been by the activities of man.

I say that primarily because to hold otherwise would be to require New Mexico to prove a negative, and I long ago gave up the idea that a negative could ever be proven.

So it seems to me, and it is my ruling, that the burden is on Texas to show that the departures have been caused by the activities of man.

Tr. at 323 (June 28, 1977).

As the charging party, Texas bears the burden of coming forward with the evidence and proving her claims correct. Facts on this issue are available from public agencies such as the U.S. Geological Survey, Soil Conservation Service,

U.S. Department of Agriculture, Pecos River Commission and the New Mexico State Engineer Office. Much, if not all, the data has been provided to Texas pursuant to her requests.

There is no precedent for the man's activities hearing. Because of the nature of the public information available on the issue, however, that phase of the case may lend itself to a substantial number of stipulations, reducing contested issues. Following completion of this phase of the case, the Court will be in a position to determine the extent to which man's activities in New Mexico caused the departures. Until then, neither the Court nor the states can know the extent to which man's activities in New Mexico are causing departures from the 1947 condition flow at the state line.

## II

### **RETROACTIVE RELIEF IS IMPROPER BECAUSE IT CONFLICTS WITH THE COMPACT AND IS INEQUITABLE IN THIS CASE**

#### **A. The compact commission rejected debit accounting and repayment on the Pecos River.**

The Master has applied to the Pecos River Compact a debit-credit accounting approach which the Compact negotiators specifically rejected. The negotiators rejected an accounting system based on accumulated debits and credits because the Pecos River is difficult to manage, flows through a geologically complicated basin and is highly variable. *See* Statement of the Case at 2-3. The river does not lend itself to a regular accounting scheme and schedule; therefore, the Pecos River Compact does not provide for an annual accounting and repayment of accumulated shortages or credit for overdelivery.

The compact commissioners initially considered debit and credit accounting:

After the Pecos River Compact Commission by negotiation agrees on the particular condition which should be controlling as between the two States, that condition can be defined for purposes of administration by setting up in the compact *schedules* based upon relations between certain water supply indexes and the state line flows . . . . A method of annual accounting which will permit *credits and debits* to accumulate within certain prescribed limits will be practicable. This will permit flexible operation and the maximum use possible of the waters of the stream with existing facilities. If a credit and debit system is not established which will permit storage of water in upstream reservoirs in the maximum amount possible, within the prescribed limits, wastes of water from the basin at times will result from spill at the lowest reservoir, which in this case is the Red Bluff Reservoir.

Synopsis of Engineering Advisory Committee's January 14, 1948 Report in S. Doc. 109 at xxxiv (emphasis added).

The compact negotiators rejected the approach as unwise, for reasons explained by Mr. Tipton:

[I]t would have been very unwise for the commission to have set out in this compact what might be called a *schedule*. It would have been unwise for several reasons. The commission may devise, as time goes on, a better means to determine this than by the inflow-outflow method. It may perfect more nearly the curves which appear in the engineering advisory committee report. We are having difficulty now in regard to one compact [the Rio Grande Compact] which involves three States, one of them being the State of Texas, where we are trying to change

the schedule without changing rights and obligations. It appears that we will have to go to the legislature to change the schedule. The way the Pecos compact is written, the commission has full authority to change the method, or to perfect the technique, so long as what is done by the commission is something directed at the *determination of the obligation* under [Article III] (a).

*Id.* at 117 (emphasis added).

The problem, again, was the difficulty of correctly analyzing the Pecos River. Because of that difficulty the compact negotiators provided for even greater flexibility and tolerance than a schedule and debit-credit account would allow. They viewed the compact as operating not by an accounting of debits, a deduction for credits, and repayment, but rather by the correction of conditions when departures due to man's activities were found:

The question has been asked, Supposing there is noncompliance on the part of either State with the provisions of the compact? What is the procedure under the terms of this draft? I interpret the draft that the commission in making its findings, which it is obligated to make, would find that that State was not complying with the terms of the compact and would report that fact to the State. That State, *then*, under the terms of the compact, is *obligated to correct* that condition. And in correcting that condition, if it requires the curtailment of the use of any water in New Mexico, under article IX the curtailment shall be made in order of priority so far as New Mexico is concerned.

*Id.* at 124 (emphasis added).



The negotiating commissioners decided not to adopt delivery schedules and an accounting system for the accrual of debits or credits as was done in the Rio Grande Compact, to which Mr. Tipton alluded in his explanation of Article III(a). The Rio Grande Compact, 53 Stat. 785 (1939), requires the computation of debits and credits of Colorado and New Mexico each calendar year by reference to delivery schedules. That system works because the Rio Grande Compact makes upstream states strictly liable for delivery deficits irrespective of the cause of those deficits. Thus, a relatively simple accounting is possible. In contrast, the Pecos River Compact negotiators wanted to guarantee that New Mexico would be liable only for increased depletions due to man's activities. They were well aware of the erratic nature of the river, and knew that a simple debit-credit accounting system would be unreliable.

The Inflow-Outflow Manual, adopted by the compact commission in December 1948, makes it even clearer that the administration of the Compact requires the Pecos River Commission to examine the establishment of trends in lieu of an annual accrual of debits and credits based upon a schedule.

The curve established by the points represents a mean of that [the 1947] condition for the historical range of streamflow. As records are accumulated, there may be departures by single points or a series of points on one or the other side of the curve. The departures may accumulate in one direction for a number of years and then shift to the other direction. A *trend* away from the mean condition is not well established until the departures accumulate to a degree which the basic data indicates is excessive, or until the accumulation in one direction is persistent for a period of time. On the other hand, an immediate change in inflow-outflow relationship



will be indicated when works which affect the depletion are constructed above the outflow point.

S. Doc. 109 at 151-52 (emphasis added).

The Manual also suggests that any three-year period which "departs materially" from the 1947 condition correlation curve should be "scrutinized carefully" in order to determine whether it should be eliminated in calculating accumulated differences from the curve. *Id.* at 156.

The compact commission's wisdom has been borne out by the hydrologic data gathered since 1948. The departures listed in column 6 of Table 2 in Texas Exhibit 79, a copy of which is reproduced in the appendix to this brief at C-1, illustrate the impracticability of precise schedules and accounting of debits and credits under a variable river like the Pecos. From 1952 to 1953 there was a negative change in the departures of 16,000 acre-feet; from 1965 to 1966, a positive change in the departures of 33,500 acre-feet; from 1968 to 1969, a negative change in departures of 35,800 acre-feet. Special Master Breitenstein specifically noted the wide ranges of departures listed in the 1948 Engineering Report in the second table on page 155 of S. Doc. 109. October 3, 1977 Special Master Report (1977 Report) at 21.

While Table 2 in Texas Exhibit 79 does not indicate whether these dramatic swings in stateline flows are due to man's activities, it is obvious that drastic changes between the averages of three-year periods could not be caused by new man-made depletions without the construction of major works. No major works were built in these periods. Therefore, those changes must be ascribed to variations in the source of flood inflow, the operation of the storage reservoirs that were part of the 1947 condition, changes in groundwater accretions resulting from significant variations in the amount and location of precipitation, or possible errors in the 1947 condition base relationship. 1979 Report at 15, 38; Tr. at 343-44 (May 21, 1986).

For these reasons, specific annual debits or credits should not be used to determine compact compliance. A trend must first be established to indicate departures and then findings made as to the causes of those departures. To the extent that departures are due to man's activities in New Mexico, the Compact remedy is for New Mexico to make corrections to adjust the deliveries to the state line.

The Master rejects the Compact remedy because he erroneously concludes that ensuring future adjustments is insufficient and that the Compact would be an "illusory contract" without the "meaningful remedy" of retroactive relief. 1986 Report at 41. To the contrary, the remedy contemplated by the Compact is diligent compliance with the Compact provision to maintain the flow of the river to deliver water to Texas in accordance with the 1947 condition. S. Doc. 109 at 151-56. If stateline flows are insufficient and any deficiencies are due to man's activities in New Mexico, New Mexico must curtail her depletions to allow the proper flow at the state line.

This relief is quite meaningful. As the proceedings below indicated, if the Master is correct and New Mexico is responsible for an average annual negative departure of 10,000 acre-feet from 1950 through 1983, then New Mexico would have to permanently terminate irrigation of approximately 14,000 acres to meet New Mexico's delivery obligation under Articles III(a) and IX. 1986 Report at 36; New Mexico Exhibit 136 at 7-8. Termination of this amount of irrigation is significant both to New Mexico and to Texas, for it should assure Texas of the flow to which she is entitled under the 1947 condition. The relief contemplated under the Compact is, thus, real, measurable and substantial, and should govern the provision for relief in this suit to enforce the Compact.

Moreover, there is no express covenant in the Pecos River Compact that requires the payment of accumulated negative

debits in stateline deliveries. Out of 23 interstate water apportionment compacts listed in the Council of State Governments report entitled *Interstate Compacts and Agencies* at 25-29 (1979), only two expressly require payment of past under-deliveries and two expressly prohibit such payment. Rio Grande Compact, Article VI, 53 Stat. 785 (1939) ("All debits and credits of Colorado and New Mexico shall be computed for each calendar year"); Upper Colorado River Compact, Article IV(b), 63 Stat. 31 (1949). Two expressly prohibit such payment with this phrase "There shall be no allowance or accumulation of credits or debits for or against either state." Arkansas River Compact, Article V(E)(5), 63 Stat. 145 (1949); Sabine River Compact, Article V(i), 65 Stat. 736 (1951). The remaining compacts do not address this question. As a matter of wise judicial policy the Court should not conclude as a matter of law that all compacts that do not expressly provide for the obligation to pay past shortfalls implicitly impose such an obligation. Implied covenants are also not favored in the law. An obligation may be implied when no other interpretation is reasonable, but the party who asserts the existence of an implied covenant bears a heavy burden. *Colorado Coal Furnace-Distributors, Inc. v. Prill Mfg. Co.*, 605 F.2d 499, 504 (10th Cir. 1979).

#### **B. Retroactive relief is inequitable in this case.**

Not only is retroactive relief unauthorized by the Compact, the relief the Master recommends is inequitable under the facts in this case. First, it penalizes New Mexico when, to the best of her knowledge and ability, she complied with the 1947 condition. In the 1930s and 1940s, New Mexico took several steps to declare groundwater basins, restrict uses and otherwise relieve the strain on the Pecos River. 462 U.S. at 558 n.3; Dunbar, "Pioneering Groundwater Legislation" 47 *Pacific Hist. Rev.* 565 (1978) (in the Roswell Basin New Mexicans

“originated in the third and fourth decades of this century groundwater-control institutions which have served as models for most of the western states”). In the 1950s New Mexico closely administered the Pecos River. Tr. at 25-27, 42-44, 49-50, 53-54 (May 20, 1986). According to the Commission’s findings in 1961 and 1962, New Mexico was meeting her obligation. When Texas filed suit, New Mexico was on notice that Texas disagreed, but the State Engineer had no basis on which to reduce uses in New Mexico in the absence of a Commission finding of underdeliveries attributable to depletions by man’s activities. *Id.* at 55. As both special masters in this case have recognized, New Mexico has acted in good faith in the administration of the Compact and has cooperated patiently with this trying and extended litigation. 1982 Report at 5, 18; 1986 Report at 3, 41. Had the appropriate officials of New Mexico been given notice by the Commission of departures caused by man-made depletions in New Mexico even as late as 1962, it would have been a simple matter to correct the condition leading to those negative departures by curtailing use on a relatively few acres under junior rights as mandated by Article IX of the Compact.

Second, retroactive relief is inequitable in this case because it would hold New Mexico to responsibility in the past for underdeliveries that had never been determined. The 1947 condition was not finally defined by the Court until 1984. 1982 Report at 18 (“the obligation is still uncertain”); 1984 Report, *adopted*, 467 U.S. 1238. The departures from that condition are being defined now. In New Mexico’s view, the extent to which those departures are due to man’s activities has yet to be defined. There is no basis for retroactive relief.

In *Wyoming v. Colorado*, 309 U.S. 572 (1940), Wyoming filed a petition asking the Court to find Colorado in contempt of a 1936 Decree, 298 U.S. 573, which equitably apportioned the waters of the Laramie River. The petition requested the

Court to impose on Colorado a fine sufficient in amount to reimburse Wyoming and her water appropriators for injuries sustained by the violation of the decree. Petition for Rule to Show Cause at 12 (July 19, 1939). Wyoming claimed that Colorado had permitted the excess diversion of over 12,000 acre-feet in the previous year. *Id.* at 573. The Court denied Wyoming's petition on the grounds that "there was a period of uncertainty and room for misunderstanding which may be considered in extenuation" and that "in the future there will be no grounds for any possible misapprehension." *Id.* at 582. The same uncertainty has existed in this case.

Moreover, retroactive relief for the past 34 years is inequitable because New Mexico did not cause the extended delay in resolution of the Compact obligations. Texas waited 26 years before raising her claim and spent another ten years in unsuccessful efforts to alter the methodology for determining the 1947 condition. Under the circumstances it is inequitable and inappropriate to ask New Mexico to bear the heavy burden of a 34-year water judgment.

### III

**EVEN IF RETROACTIVE RELIEF WERE  
PERMISSIBLE, THE TERMS OF THE RELIEF  
RECOMMENDED BY THE MASTER ARE  
IMPROPER AND SHOULD BE REMANDED  
FOR RECONSIDERATION**

New Mexico has both general and specific objections to the terms of the recommended relief. The specific objections are to the recommendations that:

- (1) New Mexico has only ten years in which to satisfy the judgment on 34 years of water delivery; and



- (2) New Mexico be charged an annual "water interest" if she does not meet the delivery terms.

New Mexico's general objections are:

- (1) in fashioning the terms of the retroactive relief, the Master failed to balance the equities; and
- (2) the Master unnecessarily excluded options such as monetary payment in lieu of water deliveries as retroactive relief.

**A. The Master fashioned equitable relief without balancing the equities.**

The Master's recommendations on relief are undermined by the same sort of procedural flaws as those relating to the man's activities finding. Because of the procedural inadequacies, the Master's recommendations lack the solid foundation needed to support them. The Master denied himself the benefit of a considered approach and reached an ill-considered recommendation.

The Master's draft report proposed terms for relief long before the states knew the question of relief was before the Court. They had never proposed appropriate relief. They had not addressed fundamental legal questions, such as the appropriate methods of relief and whether retroactive relief was available or whether monetary relief was available. They had never presented testimony on the consequences of alternative forms of relief. They had just completed an evidentiary hearing on calculating departures; the next logical steps would be determining depletions by man's activities and the appropriate relief, if any.

Instead, the Master plunged into the issue with his draft report. Although he granted New Mexico's request for a hearing



on relief, under the circumstances the hearing did not lead to a balanced consideration of the issues. April 18, 1986 Order. New Mexico presented her evidence of harm through engineers and an economist, but Texas provided only the anecdotal testimony of one witness on the benefits to Texas. In the end, the Master did not have information by which to balance relative harm and benefit to fashion terms for relief.

Even if the question of New Mexico's obligation to provide relief were clear, the Master should have balanced the equities in setting the terms of relief. The Court has always treaded carefully when adjusting interstate interests in water, befitting the high dignity of the interests involved. *Kansas v. Colorado*, 206 U.S. 46, 99-102 (1907). The Court has approached its responsibilities in water allocation with a high degree of caution and respect for the consequences of its actions. In the "delicate adjustment of interests" on an interstate stream, the Court weighs carefully "the damage to upstream areas as compared to the benefits to downstream areas." *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945). In *Colorado v. Kansas*, 320 U.S. 383, 393 (1943), the Court was "conscious of the great and serious caution" with which it should approach the case and that "all the factors which create equities in favor of one state or the other must be weighed." Because the Master's recommended decree would "inflict serious damage on existing agricultural interests" in Colorado and Kansas had taken no action for 21 years, Kansas bore an unusually heavy burden which was not sustained. *Id.* at 394.

Where the Master has not developed an adequate record to weigh the equities, the Court has remanded the case. In *Colorado v. New Mexico*, 459 U.S. 176 (1982), the Court remanded the case to the Master to make specific findings so that the Court could determine whether "the benefits to the State seeking the diversion substantially outweigh the harm to existing uses in another State." *Id.* at 190.

Although these cases cited above involved equitable apportionment, they are equally applicable here. First, this Court has recognized that its "equitable power to apportion interstate streams and the power of the States and Congress acting in concert to accomplish the same result are to a large extent complementary." 462 U.S. at 569; *see also* 1982 Report at 19. Second, this case is somewhat similar to an equitable apportionment suit because the definition of the 1947 condition was in dispute from 1970 until 1984. Third, the underlying concern for and caution to be used in shutting down valid, existing water uses is a universal value in water law and applies to the fashioning of long-term relief as well as original allocation. *Nebraska v. Wyoming*, 325 U.S. at 622; *Arizona v. California*, 373 U.S. 546, 555-56 (1963); *Colorado v. New Mexico*, 459 U.S. at 186.

Here the Master did not approach his responsibilities with the caution warranted by the consequences and he did not develop a record from which the Court may weigh the equities. The record developed in this case presents no concrete evidence on the way in which and extent to which Texas will benefit from the proposed terms of relief. The harm to New Mexico cannot be and has not been weighed against the benefits to Texas. The evidence is insufficient because the record on this issue was made in reaction to the Master's draft report, rather than through an orderly consideration of the issue of appropriate relief. Consequently, the recommended relief is flawed.

**B. Requiring satisfaction of a 34-year judgment in ten years would be inequitable.**

Because the Master failed to balance the harm to New Mexico against the benefit to Texas in fashioning terms of relief, the Master improperly recommends New Mexico be limited to a ten-year period in which to satisfy the recommended judgment. The Master first arrived at this ten-year time frame on the basis

of his generalized understandings and presumptions, not on a weighing and consideration of evidence.

The Master first proposed in his draft report that New Mexico satisfy in ten years the 34-year judgment. He based this scheme on a generalized notion of balancing the "damage to New Mexico's Pecos Basin economy against Texas' legal right to water — the lack of which has presumably inhibited the development of a Texas Pecos Basin economy . . . ." Draft Report at 30. He reached this understanding without the benefit of evidence on past injuries or future harms and benefits resulting from any particular scheme for retroactive relief.

In response, New Mexico argued for and received an opportunity to present evidence of economic impacts expected from the recommendation. Tr. at 93 (April 16, 1986). Hearing was set for the next month. April 18, 1986 Order. The Order provided that New Mexico limit her evidence to four specific delivery schedules and that Texas "may" rebut New Mexico's case and offer evidence of economic impacts to Texas of the delivery schedules. *Id.* at 2. Presumably, this evidence would assist the Master in tailoring relief in accordance with equitable principles. This, however, was not to be the case.

Despite a severely abbreviated discovery and hearing schedule, New Mexico offered specific evidence addressing each one of the Master's proposed schedules. New Mexico's hydrologic studies showed the effects upon river flow of retiring certain irrigated areas in the Pecos River basin. New Mexico Exhibits 128, 133, 134; testimony of John Couzens and Deborah Hathaway, Tr. at 114-31, 138-69 (May 20, 1986). Those studies showed it would be impossible to satisfy the judgment in ten years by retiring the 112,800 acres in the Roswell Basin with junior water rights. Even if all lands in the Roswell Basin were retired immediately, the full effects will not reach the river within the Master's time frame. With a delivery rate of 30,000

acre-feet per year for 20 years, rather than ten years, the direct impact could reach \$117,866,700 in 1986 dollars. New Mexico Exhibit 136 at 15. The indirect costs, i.e., the decline in agriculturally related industries, loss of employment, impact on regional businesses, would be approximately \$163,017,000. *Id.* at 31. This evaluation of the costs to New Mexico cannot, of course, be directly compared to the costs which would be incurred under the Master's more abbreviated delivery schedule, but the costs under the recommended decree would be obviously substantial.

Texas, on the other hand, presented virtually no hard data on the expected benefits from water deliveries under a ten-year or any other time frame, nor did she produce data on the economic consequences of past shortfalls in the Pecos River basin in Texas. Instead, Texas relied upon anecdotal testimony on the history of irrigation in the area. Testimony of Theresa Walker, Tr. at 385-406 (May 21, 1986).

There were only two areas of testimony which provide any assistance in examining the effect of the proposed relief on Texas; both require assumptions not in evidence. First, the Texas witness testified that it would take, at the farm headgate, approximately seven acre-feet per acre to grow alfalfa and about five acre-feet per acre for cotton. Tr. at 409-10 (May 21, 1986). From this information, one may reasonably assume that, after channel and distribution losses, a stateline delivery of nine acre-feet per acre is necessary to deliver five to seven acre-feet per acre at the farm headgates in Texas. In that case, the 34,010 acre-feet per year under a ten-year schedule could serve only about 3,800 acres for ten years while terminating irrigation of 112,800 acres in New Mexico. Second, Dr. Snyder testified that the value of water ranges from \$10 to \$25 per acre-foot. Tr. at 201 (May 20, 1986). One could assume, then, a total direct benefit of this water to Texas of, at most, \$8,502,500. Assuming that 112,800 acres with a duty of three acre-feet

per acre would be out of service in New Mexico for ten years, the direct cost to New Mexico would be \$84,600,000. There is nothing in the record to indicate that the Master performed these calculations and balanced the equities.

The Master's Report essentially repeats his earlier recommendation, although he grants New Mexico a three-year grace period in which to begin delivering water. 1986 Report at 36. The Master may well have weighed the generalized harm suffered by Texas against specific damage New Mexico will suffer in the future, but it is unclear from the record below how he could have done so.

What the Master has done is propose unrealistic solutions which he apparently believes might diminish New Mexico's enormous financial and administrative burden in curtailing uses in the Roswell Basin. There is no basis in the record for any of these proposals. In seeming response to Texas' suggestions during cross-examination of S.E. Reynolds, the New Mexico State Engineer, the Master suggests that New Mexico purchase or condemn groundwater rights, pump the water, and pipe it directly to the river. Tr. at 56-59 (May 20, 1986); 1986 Report at 34-35. This "solution" ignores the potential expense, litigation and time that would be involved.

The Master also suggests that New Mexico could condemn and retire the senior surface water rights in the Carlsbad Irrigation District on a temporary basis, or "rent" the water. 1986 Report at 35. The "solution" may be facially attractive, but, again, is without foundation in the record or reality. For example, the Carlsbad Irrigation District is a federal reclamation project with legal title to the water rights claimed by the Bureau of Reclamation. Further, irrigators in the district could not be expected to "rent" their water to the state for a number of years and stay in business. New Mexico Exhibit 136 at 1. The remaining irrigators would unfairly bear the



annual operation and maintenance costs for the entire district's facilities.

It is apparent from the lack of data and evidence below that these options were suggested by the Master without the careful consideration necessary to determine whether these solutions are realistic, workable alternatives.

**C. There is no basis for water interest.**

The Master, having recommended an inordinately severe delivery schedule, makes the relief even more harsh by recommending that New Mexico pay water interest to Texas each year on the balance of water owed, but not delivered. No statute authorizes interest on judgments in original actions in this Court; common law judgments do not bear interest. *Pierce v. United States*, 255 U.S. 398, 406 (1921). Neither do the express terms of the Pecos River Compact, a contract, authorize water interest. See *Virginia v. West Virginia*, 238 U.S. 202 (1915).

The Master recommends imposing water interest as an "incentive to fulfill the terms of the decree." 1986 Report at 38. Setting aside the offense to New Mexico and her past record of cooperation and good faith, the Master's recommended relief is plainly wrong as a matter of law.

**D. New Mexico should have the option of monetary damages.**

While the Master felt it quite possible that both Texas and New Mexico would be better off with a monetary solution than with payment in kind, he did not feel free to recommend that the Court impose a monetary solution for the reason that there is "no explicit basis" for such a remedy in the Compact. On the other hand, he recommends retroactive relief by the



delivery of water to pay past shortfalls despite the absence of any explicit basis for such a remedy in the Compact.

The Master recognized that the delivery of water to pay past shortfalls may pose a "serious problem" to New Mexico, and that both Texas and New Mexico could be "better off with a monetary solution." Tr. at 94 (April 16, 1986); 1986 Report at 31. "The real way to take care of it . . . is for New Mexico to pay Texas some money and Texas ought to take something considerably less than what the value is to New Mexico because Texas is going to get less water [than New Mexico would have to give up]." Tr. at 200 (May 20, 1986). Notwithstanding these concerns, however, he rejected damages because he could find no authority in the Compact for awarding such relief.

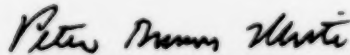
If the Court finds that man's activities caused the departures, that the Compact requires the delivery of accumulated departures, and retroactive relief is appropriate under the circumstances of this case, then the Court should allow New Mexico the option of paying monetary damages in lieu of specific performance. The gravity of the potential consequences to New Mexico's economy requires no less. New Mexico stipulated that, hypothetically, the Court has authority to offer as an alternative the payment of monetary damages. Tr. at 94 (April 16, 1986). However, this offer should not be construed, as apparently the Master does, as a concession that the Compact authorizes retroactive relief. 1986 Report at 40 n.18 (citation in footnote should be to the April 16, not May 16, 1986 transcript). Because the Master did not hear evidence earlier on monetary relief, a hearing and determination of the nature and extent of damages would be needed on remand; if damages provide an adequate remedy, specific performance should not be required.

## CONCLUSION

The Court should reject the Master's recommendation of retroactive relief. The Court should return this case to the Master to determine whether man's activities depleted the flows of the Pecos River at the state line. Alternatively, if the Court holds that retroactive relief is required under the Compact and appropriate in this case, and finds that man's activities caused depletions in stateline flows, the Court should instruct the Master to balance the equities and determine the monetary damages that might be paid by New Mexico in lieu of water delivery.

Respectfully submitted,

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## APPENDIX A

### OBJECTIONS TO PROPOSED DECREE

New Mexico objects to the Master's proposed decree as contrary to the Pecos River Compact, internally inconsistent, inconsistent with the Master's findings and unworkable in administration.

1. Articles II(A) and II(B) of the proposed decree in effect amend the Compact by depriving the Pecos River Commission of its discretionary powers under Articles VI(a), VI(b) and VI(c) of the Compact. Because channel losses in the various reaches of the Pecos River are continually changing, the channel loss equations in Texas Exhibit 79 must be subject to change in order to correctly compute flood inflows. More importantly, because contemplated administrative procedures may be found technically infeasible, the Commission must be free to devise and adopt "a more feasible method" of river accounting. These articles in the Master's proposed decree would not allow the Commission to exercise authority expressly delegated to it by the Compact. The proposed decree would impermissibly rewrite the Pecos River Compact. *Texas v. New Mexico*, 462 U.S. 554, 565 (1983).

2. Article V of the proposed decree suggests the appointment of an arbiter. This too would be an impermissible amendment to the Compact. *Id.* at 565-66.

3. Article II of the proposed decree does not provide for a complete accounting of departures. Neither Texas Exhibit 68 nor Texas Exhibit 79 includes those adjustments which must be made to the computations of departures, i.e., adjustments for McMillan Dike, Malaga Bend, and the upper reach of the river. Texas Exhibit 79 does not provide any procedures for determining whether negative departures at the state line are

due to man's activities in New Mexico. The proposed decree at footnote 1, however, recognizes that Texas Exhibit 79 will have to be modified in order to reflect man-made depletions chargeable to New Mexico.

4. Articles II(A) and II(B) of the proposed decree would enjoin the State of New Mexico:

(A) To comply with the Article III(a) obligation of the Pecos River Compact by delivering to Texas at state line *each year* an amount of water calculated in accordance with the inflow-outflow equation contained in Tex. Exh. 68 at page 2. (Emphasis added.)

and

(B) To calculate the Index Inflow component of the inflow-outflow equation by using the inflow-outflow and channel loss equations contained in Tex. Exh. 79.

The inflow-outflow equation contained in Texas Exhibit 68 at 2 does not, by itself, determine New Mexico's Article III(a) delivery obligation. Other computations must be made to determine the delivery obligation. In addition to the adjustments discussed in paragraph 2 above, the variations in delivery at the state line due to such factors as the location of flood inflows, reservoir operation, and precipitation should be taken into account. For example, S. Doc. 109 at 155, second table on page, and Texas Exhibit 79, table 2, show that wide departures, both positive and negative, will occur. Those departures result from the operation of conservation storage reservoirs in New Mexico, as they existed under the 1947 condition, and the erratic hydrologic nature of the Pecos River basin. 1982 Report at 6. Flood inflows constitute more than half of the annual index inflow to the river. 1984 Report at 4. In those years in

which the flood inflows occur predominantly below the conservation storage reservoirs in New Mexico, positive departures from the inflow-outflow relationship must be expected. Conversely, when the flood inflows occur predominantly above those reservoirs, negative departures must be expected. See Master's Exhibit 27 at 46. Furthermore, periods of relatively abundant or deficient rainfall affect the springs discharging to the river and will cause, a year or several years later, positive or negative departures from the inflow-outflow relationship. Departures caused by reservoir operation, location of flood flow, or variations in precipitation are not chargeable as depletions due to man's activities in New Mexico under the Compact, but they would be so charged under these articles.

Requiring New Mexico to meet her Article III(a) Compact obligation *each year* would result in operating the 1947 condition reservoirs in an extremely inefficient manner and diminishing water use to well below what she is entitled to under the 1947 condition. The reservoir operation required could result in waste of the limited water supply of the Pecos River basin.

The Master relies upon the accrual of debits and credits as the basis for New Mexico's past obligations but does not provide for credits for positive departures from the 1947 condition in the future. Given the erratic nature of the river, and the variations discussed above, New Mexico cannot escape substantially exceeding the "annual minimum delivery obligation," yet would receive no credit for doing so. If the Pecos River Compact is to be interpreted as allowing accrual of debits, provision must be made for credit accounting as well.

5. Article II(C) of the proposed decree requires both a delivery of additional water "aggregating" 340,100 acre-feet over a period of ten years *and* a delivery of "not less than"



34,010 acre-feet per year for ten years. These requirements penalize New Mexico because no credits are allowed for over-deliveries during the ten-year delivery schedule under this article.

6. Article IV of the proposed decree requires water interest on the balance of any amount owed under "Section II(b)" of the proposed decree. Article or Section II(b) merely relates to the computation of the index inflows, and not to New Mexico's obligation under the Compact. This provision in the article is unclear.

## **APPENDIX B**

### **PECOS RIVER COMPACT**

The State of New Mexico and the State of Texas, acting through their Commissioners,

John H. Bliss for the State of New Mexico and  
Charles H. Miller for the State of Texas,

after negotiations participated in by Berkeley Johnson, appointed by the President as the representative of the United States of America, have agreed respecting the uses, apportionment and deliveries of the water of the Pecos River as follows:

#### **ARTICLE I**

The major purposes of this Compact are to provide for the equitable division and apportionment of the use of the waters of the Pecos River; to promote interstate comity; to remove causes of present and future controversies; to make secure and protect present development within the states; to facilitate the construction of works for, (a) the salvage of water, (b) the more efficient use of water, and (c) the protection life and property from floods.

#### **ARTICLE II**

As used in this Compact:

(a) The term "Pecos River" means the tributary of the Rio Grande which rises in north-central New Mexico and flows in a southerly direction through New Mexico and Texas and joins the Rio Grande near the town of Langtry, Texas, and includes all tributaries of said Pecos River.

(b) The term "Pecos River Basin" means all of the contributing drainage area of the Pecos River and its tributaries above its mouth near Langtry, Texas.

(c) "New Mexico" and "Texas" means the State of New Mexico and the State of Texas, respectively; "United States" means the United States of America.

(d) The term "Commission" means the agency created by this Compact for the administration thereof.

(e) The term "deplete by man's activities" means to diminish the stream flow of the Pecos River at any given point as a result of beneficial consumptive uses of water within the Pecos River Basin above such point. For the purposes of this Compact it does not include the diminution of such flow by encroachment of salt cedars or other like growth, or by deterioration of the channel of the stream.

(f) The term "Report of the Engineering Advisory Committee" means that certain report of the Engineering Advisory Committee dated January, 1948, and all appendices thereto; including, basic data, processes, and analyses utilized in preparing that report, all of which were reviewed, approved, and adopted by the Commissioners signing this Compact at a meeting held in Santa Fe, New Mexico, on December 3, 1948, and which are included in the Minutes of that meeting.

(g) The term "1947 condition" means that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee. In determining any question of fact hereafter arising as to such situation, reference shall be made to, and decisions shall be based on, such report.

(h) The term "water salvaged" means that quantity of water which may be recovered and made available for beneficial use and which quantity of water under the 1947 condition was non-beneficially consumed by natural processes.

(i) The term "unappropriated flood waters" means water originating in the Pecos River Basin above Red Bluff Dam in Texas, the impoundment of which will not deplete the water usable by the storage and diversion facilities existing in either state under the 1947 condition and which if not impounded will flow past Girvin, Texas.

### ARTICLE III

(a) Except as stated in paragraph (f) of this Article, New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition.

(b) Except as to the unappropriated flood waters thereof, the apportionment of which is included in and provided for by paragraph (f) of this Article, the beneficial consumptive use of the waters of the Delaware River is hereby apportioned to Texas, and the quantity of such beneficial consumptive use shall be included in determining waters received under the provisions of paragraph (a) of this Article.

(c) The beneficial consumptive use of water salvaged in New Mexico through the construction and operation of a project or projects by the United States or by joint undertakings of Texas and New Mexico, is hereby apportioned forty-three per cent (43%) to Texas and fifty-seven per cent (57%) to New Mexico.

(d) Except as to water salvaged, apportioned in paragraph (c) of this Article, the beneficial consumptive use of water which shall be non-beneficially consumed, and which is recovered, is hereby apportioned to New Mexico but not to have the effect of diminishing the quantity of water available to Texas under the 1947 condition.

(e) Any water salvaged in Texas is hereby apportioned to Texas.

(f) Beneficial consumptive use of unappropriated flood waters is hereby apportioned fifty per cent (50%) to Texas and fifty per cent (50%) to New Mexico.

#### ARTICLE IV

(a) New Mexico and Texas shall cooperate to support legislation for the authorization and construction of projects to eliminate non-beneficial consumption of water.

(b) New Mexico and Texas shall cooperate with agencies of the United States to devise and effectuate means of alleviating the salinity conditions of the Pecos River.

(c) New Mexico and Texas each may:

(i) Construct additional reservoir capacity to replace reservoir capacity made unusable by any cause.

(ii) Construct additional reservoir capacity for utilization of water salvaged and appropriated flood water apportioned by this Compact to such state.

(iii) Construct additional reservoir capacity for the purpose of making more efficient use of water apportioned by this Compact to such state.

(d) Neither New Mexico nor Texas will oppose the construction of any facilities permitted by this Compact, and New Mexico and Texas will cooperate to obtain the construction of facilities that will be of joint benefit to the two states.

(e) The Commission may determine the conditions under which Texas may store water in works constructed in and operated by New Mexico.

(f) No reservoir shall be constructed and operated in New Mexico above Avalon Dam for the sole benefit of Texas unless the Commission shall so determine.

(g) New Mexico and Texas each has the right to construct and operate works for the purpose of preventing flood damage.

(h) All facilities shall be operated in such manner as to carry out the terms of this Compact.

#### ARTICLE V

(a) There is hereby created an interstate administrative agency to be known as the "Pecos River Commission." The Commission shall be composed of one Commissioner representing each of the states of New Mexico and Texas, designated or appointed in accordance with the laws of each such state, and, if designated by the President, one Commissioner representing the United States. The President is hereby requested to designate such a Commissioner. If so designated, the Commissioner representing the United States shall be the presiding officer of the Commission, but shall not have the right to vote in any of the deliberations of the Commission. All members of the Commission must be present to constitute a quorum.



(b) The salaries and personal expenses of each Commissioner shall be paid by the government which he represents. All other expenses which are incurred by the Commission incident to the administration of this Compact and which are not paid by the United States shall be borne equally by the two states. On or before November 1 of each even numbered year the Commission shall adopt and transmit to the Governors of the two states and to the President a budget covering an estimate of its expenses for the following two years. The payment of the expenses of the Commission and of its employees shall not be subject to the audit and accounting procedures of either of the two states. However, all receipts and disbursements of funds handled by the Commission shall be audited yearly by a qualified independent public accountant and the report of the audit shall be included in, and become a part of, the annual report of the Commission.

(c) The Commission may appoint a secretary who, while so acting, shall not be an employee of either state. He shall serve for such term, receive such salary, and perform such duties as the Commission may direct. The Commission may employ such engineering, legal, clerical, and other personnel as in its judgment may be necessary for the performance of its functions under this Compact. In the hiring of employees the Commission shall not be bound by the civil service laws of either state.

(d) The Commission, so far as consistent with this Compact, shall have power to:

1. Adopt rules and regulations;
2. Locate, establish, construct, operate, maintain, and abandon water gaging stations, independently or in cooperation with appropriate governmental agencies;

3. Engage in studies of water supplies of the Pecos River and its tributaries, independently or in cooperation with appropriate governmental agencies;

4. Collect, analyze, correlate, preserve and report on data as to the stream flows, storage, diversions, salvage, and use of the waters of the Pecos River and its tributaries, independently or in cooperation with appropriate governmental agencies;

5. Make findings as to any change in depletion by man's activities in New Mexico, and on the Delaware River in Texas;

6. Make findings as to the deliveries of water at the New Mexico-Texas state line;

7. Make findings as to the quantities of water salvaged and the amount thereof delivered at the New Mexico-Texas state line;

8. Make findings as to quantities of water non-beneficially consumed in New Mexico;

9. Make findings as to quantities of unappropriated flood waters;

10. Make findings as to the quantities of reservoir losses from reservoirs constructed in New Mexico which may be used for the benefit of both states, and as to the share thereof charged under Article VI hereof to each of the states;

11. Acquire and hold such personal and real property as may be necessary for the performance of its duties hereunder and to dispose of the same when no longer required;

12. Perform all functions required of it by this Compact and do all things necessary, proper or convenient in the performance of its duties hereunder, independently or in cooperation with appropriate governmental agencies;

13. Make and transmit annually to the Governors of the signatory states and to the President of the United States on or before the last day of February of each year, a report covering the activities of the Commission for the preceding year.

(e) The Commission shall make available to the Governor of each of the signatory states any information within its possession at any time, and shall always provide free access to its records by the Governors of each of the States, or their representatives, or authorized representatives of the United States.

(f) Findings of fact made by the Commission shall not be conclusive in any court, or before any agency or tribunal, but shall constitute prima facie evidence of the facts found.

(g) The organization meeting of the Commission shall be held within four months from the effective date of this Compact.

## ARTICLE VI

The following principles shall govern in regard to the apportionment made by Article III of this Compact:

(a) The report of the Engineering Advisory Committee, supplemented by additional data hereafter accumulated, shall be used by the Commission in making administrative determinations.

(b) Unless otherwise determined by the Commission, depletions by man's activities, state-line flows, quantities of

water salvaged, and quantities of unappropriated flood waters shall be determined on the basis of three-year periods reckoned in continuing progressive series beginning with the first day of January next succeeding the ratification of this Compact.

(c) Unless and until a more feasible method is devised and adopted by the Commission the inflow-outflow method, as described in the Report of the Engineering Advisory Committee, shall be used to:

(i) Determine the effect on the state-line flow of any change in depletions by man's activities or otherwise, of the waters of the Pecos River in New Mexico.

(ii) Measure at or near the Avalon Dam in New Mexico the quantities of water salvaged.

(iii) Measure at or near the state line any water released from storage for the benefit of Texas as provided for in subparagraph (d) of this Article.

(iv) Measure the quantities of unappropriated flood waters apportioned to Texas which have not been stored and regulated by reservoirs in New Mexico.

(v) Measure any other quantities of water required to be measured under the terms of this Compact which are susceptible of being measured by the inflow-outflow method.

(d) If unappropriated flood waters apportioned to Texas are stored in facilities constructed in New Mexico, the following principles shall apply:

(i) In case of spill from a reservoir constructed in and operated by New Mexico, the water stored to the credit of Texas will be considered as the first water to spill.

(ii) In case of spill from a reservoir jointly constructed and operated, the water stored to the credit of either state shall not be affected.

(iii) Reservoir losses shall be charged to each state in proportion to the quantity of water belonging to that State in storage at the time the losses occur.

(iv) The water impounded to the credit of Texas shall be released by New Mexico on the demand of Texas.

(e) Water salvaged shall be measured at or near the Avalon Dam in New Mexico and to the quantity thereof shall be added a quantity equal to the quantity of salvaged water depleted by man's activities above Avalon Dam. The quantity of water salvaged that is apportioned to Texas shall be delivered by New Mexico at the New Mexico-Texas state line. The quantity of unappropriated flood waters impounded under paragraph (d) of this Article, when released shall be delivered by New Mexico at the New Mexico-Texas state line in the quantity released less channel losses. The unappropriated flood waters apportioned to Texas by this Compact that are not impounded in reservoirs in New Mexico shall be measured and delivered at the New Mexico-Texas state line.

(f) Beneficial use shall be the basis, the measure, and the limit of the right to use water.

## ARTICLE VII

In the event of importation of water by man's activities to the Pecos River Basin from any other river basin the state making the importation shall have the exclusive use of such imported water.

## ARTICLE VIII

The provisions of this Compact shall not apply to, or interfere with, the right or power of either signatory state to regulate within its boundaries the appropriation, use and control of water, not inconsistent with its obligations under this Compact.

## ARTICLE IX

In maintaining the flows at the New Mexico-Texas state line required by this Compact, New Mexico shall in all instances apply the principle of prior appropriation within New Mexico.

## ARTICLE X

The failure of either state to use the water, or any part thereof, the use of which is apportioned to it under the terms of this Compact, shall not constitute a relinquishment of the right to such use, nor shall it constitute a forfeiture or abandonment of the right to such use.

## ARTICLE XI

Nothing in this Compact shall be construed as:

(a) Affecting the obligations of the United States under the Treaty with the United Mexican States (Treaty Series 994);

(b) Affecting any rights or powers of the United States, its agencies or instrumentalities, in or to the waters of the Pecos River, or its capacity to acquire rights in and to the use of said waters;

(c) Subjecting any property of the United States, its agencies or instrumentalities, to taxation by any state or subdivision



thereof, or creating any obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction or operation of any property or works of whatever kind, to make any payment to any state or political subdivision thereof, state agency, municipality or entity whatsoever, in reimbursement for the loss of taxes;

(d) Subjecting any property of the United States, its agencies or instrumentalities, to the laws of any state to an extent other than the extent to which such laws would apply without regard to this Compact.

## ARTICLE XII

The consumptive use of water by the United States or any of its agencies, instrumentalities or wards shall be charged as a use by the state in which the use is made; provided, that such consumptive use incident to the diversion, impounding, or conveyance of water in one state for use in the other state shall be charged to such latter state.

## ARTICLE XIII

This Compact shall not be construed as establishing any general principle or precedent applicable to other interstate streams.

## ARTICLE XIV

This Compact may be terminated at any time by appropriate action of the legislatures of both of the signatory states. In the event of such termination, all rights established under it shall continue unimpaired.

ARTICLE XV

This Compact shall become binding and obligatory when it shall have been ratified by the legislature of each State and approved by the Congress of the United States. Notice of ratification by the legislature of each State shall be given by the Governor of that State to the Governor of the other State and to the President of the United States, and the President is hereby requested to give notice to the Governor of each State of approval by the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have executed three counter-parts hereof each of which shall be and constitute an original, one of which shall be deposited in the archives of the Department of State of the United States, and one of which shall be forwarded to the Governor of each State.

Done at the City of Santa Fe, State of New Mexico, this 3rd day of December, 1948.

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JOHN H. BLISS

Commissioner for the State of New  
Mexico

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CHARLES H. MILLER

Commissioner for the State of Texas

APPROVED

---

BERKELEY JOHNSON

Representative of the United States of  
America



## APPENDIX C

Table 2

PECOS RIVER COMPACT  
SUMNER (ALAMOGORDO) DAM TO NEW MEXICO-TEXAS STATE LINE REACH  
SUMMARY OF ANNUAL INFLOW-OUTFLOW COMPUTATIONS IN 1000 AC-FT UNITS  
1950-1983

YEAR	ANNUAL FLOOD INFLOW (1)	INDEX INFLOW (2)	HISTORICAL OUTFLOW (3)	3-YEAR AVERAGE HISTORICAL OUTFLOW (4)	1947 CONDITION INDEX OUTFLOW (5)	DEPARTURE (6)	ACCUMULATED DEPARTURE (7)
1950	274.5		176.5				
1951	169.3		73.1				
1952	153.5	199.1	50.3	100.0	91.6	8.4	8.4
1953	124.4	149.1	36.0	53.1	50.7	-7.6	.8
1954	351.2	209.7	227.3	104.5	98.7	5.8	-6.6
1955	321.4	265.7	146.7	136.7	38.2	-1.5	5.1
1956	145.1	272.6	36.6	136.9	143.3	-6.4	-1.3
1957	145.3	204.0	48.6	77.3	94.9	-17.6	-18.9
1958	334.8	208.4	148.6	77.9	97.8	-19.9	-38.8
1959	160.5	213.5	54.4	83.9	101.2	-17.3	-56.1
1960	277.5	257.6	108.8	103.9	132.2	-28.3	-84.4
1961	176.0	204.7	57.9	73.7	95.3	-21.6	-106.0
1962	172.3	208.4	37.8	68.2	97.9	-29.7	-135.7
1963	180.0	176.1	42.1	45.9	77.0	-31.1	-166.8
1964	85.8	146.0	15.1	31.7	59.0	-27.3	-194.1
1965	162.0	142.6	50.4	35.9	57.0	-21.1	-215.2
1966	464.7	237.5	325.2	130.2	117.8	12.4	-202.8
1967	153.1	259.9	27.6	134.4	133.9	.5	-202.3
1968	154.6	257.5	36.8	129.9	132.1	-2.2	-204.5
1969	270.1	192.6	83.8	49.4	87.4	-38.0	-242.5
1970	150.3	191.7	34.5	51.7	86.8	-35.1	-277.6
1971	127.5	182.6	27.7	48.7	81.0	-32.3	-309.9
1972	193.4	157.1	48.7	37.0	65.4	-28.4	-338.3
1973	242.7	187.9	79.4	51.9	84.4	-32.5	-370.8
1974	301.4	245.8	173.2	100.4	123.7	-23.3	-394.1
1975	116.9	220.3	46.9	99.8	105.9	-6.1	-400.2
1976	102.9	173.7	21.4	80.5	75.5	5.0	-395.2
1977	102.1	107.3	12.1	26.8	38.0	-11.2	-406.4
1978	217.7	140.9	104.9	46.1	56.0	-9.9	-416.3
1979	158.2	159.3	47.5	54.8	66.7	-11.9	-428.2
1980	201.1	192.3	74.5	75.6	87.2	-11.6	-439.8
1981	96.7	152.0	44.7	55.6	62.4	-6.8	-446.6
1982	162.6	153.5	37.3	52.2	63.3	-11.1	-457.7
1983	174.6	144.6	31.2	37.7	58.2	-20.5	-478.2
AVERAGE	194.8		75.5		89.7	-14.9	

EXPLANATION OF COLUMNS

- (1) ALAMOGORDO DAM TO STATE LINE
- (2) PROGRESSIVE 3-YEAR AVERAGE OF COLUMN (1)
- (3) ANNUAL GAGED OUTFLOW AT NEW MEXICO-TEXAS STATE LINE
- (4) PROGRESSIVE 3-YEAR AVERAGE OF COLUMN (3)
- (5) 1947 CONDITION INDEX OUTFLOW COMPUTED FROM EQ:  $Y = 0.0489892 \cdot (X)^{**1.42318}$
- (6) COLUMN (4) MINUS COLUMN (5)
- (7) CUMULATIVE TOTAL OF COLUMN (6)

Revised November 26, 1985 as stipulated by Texas and New Mexico  
on November 18, 1985.

(4)

Supreme Court, U.S.  
**FILED**  
**DEC 18 1986**  
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CLERK

No. 65 Original

In The  
**Supreme Court of the United States**  
October Term, 1986

THE STATE OF TEXAS )  
Plaintiff, )  
-vs- )  
THE STATE OF NEW MEXICO )  
Defendant )  
and )  
UNITED STATES OF AMERICA, )  
Intervenor )

**JOINT BRIEF OF AMICI CURIAE  
THE INCORPORATED MUNICIPALITIES OF  
ALAMOGORDO, ARTESIA, CAPITAN, PECOS, ROSWELL,  
RUIDOSO, RUIDOSO DOWNS AND SANTA ROSA,  
NEW MEXICO  
IN SUPPORT OF THE STATE OF NEW MEXICO**

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## TABLE OF CONTENTS

Description	Page
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
INTRODUCTION AND STATEMENT OF INTEREST	
OF <i>AMICI CURIAE</i> .....	1
A. Names and descriptions of <i>amici curiae</i> .....	1
1. City of Alamogordo .....	1
2. City of Artesia .....	2
3. Village of Capitan .....	2
4. Village of Pecos .....	2
5. City of Roswell .....	3
6. Village of Ruidoso .....	3
7. Village of Ruidoso Downs .....	3
8. City of Santa Rosa .....	4
B. Detriment to <i>Amici Curiae</i> .....	4
SUMMARY OF ARGUMENT .....	6
POINT I: Hardship on <i>amici</i> , among others, will be severe if the Court requires a payback. Hardship is a proper consideration in determining relief in favor of one State against another .....	6
POINT II: The Court is without jurisdiction to require New Mexico to pay back past short deliveries of water under the Pecos River Compact .....	12
POINT III: The Special Master erroneously created a remedy of payback for Pecos River Compact underdeliveries .....	15
A. The Pecos River Compact is more properly construed as a Federal Law than as a contract. Contract remedies should therefore be unavailable .....	15
B. Remedies may be inferred from Federal Laws only if the test of <i>Cort v. Ash</i> is satisfied. The remedy of a water payback does not meet that test .....	15
CONCLUSION .....	19

## TABLE OF AUTHORITIES

Description	Page
<b>CONSTITUTIONAL PROVISIONS</b>	
U.S. Const., Amend. XI .....	12, 13, 14, 19
N.M. Const., art. XVI, §2 .....	4, 8, 14
<b>INTERSTATE COMPACTS</b>	
Pecos River Compact .....	4, 6, 15, 16, 17
Pecos River Compact, Article III(a) .....	4, 18, 19
Pecos River Compact, Article IX .....	4, 8
Rio Grande Compact, arts. I, VI, VII, §72-15-23, N.M.S.A., 1978; 53 Stat. 785 (1939) .....	17
<b>STATUTES</b>	
N.M. Laws of 1907, Ch. 49 .....	5
§72-1-5, N.M.S.A., 1978 .....	7
§72-15-23, N.M.S.A., 1978 (Rio Grande Compact, arts. I, VI, VII, 53 Stat. 785 (1939)) .....	17
<b>CASES</b>	
<i>City of Harrisonville, Mo. v. W.S. Dickey Clay Mfg. Co.</i> , 289 U.S. 334 (1933) .....	7
<i>City of Raton v. Vermejo Conservancy District</i> , 101 N.M. 95, 678 P.2d 1170 (1984) .....	7
<i>Colorado v. Kansas</i> , 320 U.S. 383 (1943) .....	9, 10, 11
<i>Colorado v. New Mexico (I)</i> , 459 U.S. 183 (1982) .....	14
<i>Cort v. Ash</i> , 422 U.S. 66 (1975) .....	16
<i>Edelman v. Jordan</i> , 415 U.S. 651 (1975) .....	13, 17
<i>Kaiser Steel Corporation v. W.S. Ranch Company</i> , 81 N.M. 414, 467 P.2d 986 (1970) .....	7

<i>Massachusetts Mut. Life Ins. Co. v. Russell</i> , 473 U.S. _____	17
87 L.Ed.2d 96, 105 (June 27, 1985) .....	17
<i>North Dakota v. Minnesota</i> , 263 U.S. 365 (1923) .....	12, 13
<i>Quern v. Jordan</i> , 440 U.S. 332 (1979) .....	14
<i>State v. Pecos Valley Artesian Conservancy District, L. T.</i>	
<i>Lewis, et al.</i> , 99 N.M. 699, 663 P.2d 358 (1983) .....	5
<i>State v. Pecos Valley Artesian Conservancy District</i> ,	
99 N.M. at 701 .....	8
<i>State ex rel. Reynolds v. Crider</i> , 431 P.2d 45, 78 N.M. 312	
(1967) .....	3
<i>State ex rel. Reynolds v. Sharp</i> , 66 N.M. 192, 344 P.2d	
943 (1959) .....	8
<i>Texas v. New Mexico</i> , 462 U.S. 554 (1983) .....	15
<i>West Virginia ex rel. Dyer v. Simms</i> , 341 U.S. 22 (1951) .....	15

## TREATISES

3 Hutchins, <i>Water Rights Laws in the Nineteen Western</i>	
<i>States</i> 73, et seq. ....	13



## INTRODUCTION AND STATEMENT OF INTEREST OF *AMICI CURIAE*

### A. *AMICI CURIAE*

The *amici* are New Mexico communities with water rights located on the main stream and principal tributaries of the Pecos River. The water rights of these communities have been or are in the process of being adjudicated in a state court proceeding known as *State ex rel. S.E. Reynolds, State Engineer, vs. L.T. Lewis, et al.*, Chaves County District Court No. 20294 and 22600, Consolidated. The adjudication involves both the surface and underground waters of the Pecos River stream system. The water rights of some 3,000 owners have been provisionally adjudicated in that action. The rights of several thousand additional owners as well as federal and Indian rights remain to be adjudicated.

The water rights of the municipalities and their interests in this proceeding are summarized as follows:

#### 1. City of Alamogordo:

The City of Alamogordo is a city of 29,000 people located in the Tularosa Basin which lies to the west of the Pecos drainage. The City owns and operates Bonito Reservoir, lying within the Pecos Basin in the Sacramento Mountains. Bonito Reservoir supplies Alamogordo and Holloman Air Force Base with water by means of a 70-mile pipeline. Other communities also have certain rights to take water from the pipeline. The City's surface water right amounts to approximately 1500 acre feet. Holloman Air Force Base is entitled to an equal amount from Bonito Reservoir.

The City's need for water far exceeds the 1500 acre feet the City is entitled to take from Bonito Reservoir. However, the reservoir water is very important to the City because of its purity. It is much better quality water than is available to the City locally. Reservoir water is blended with lower quality waters to extend the amount of water of acceptable quality available for the City's 29,000 residents.

## 2. City of Artesia:

The City of Artesia is located on the Pecos River main stem in northern Eddy County, New Mexico. Eddy County borders the State of Texas on the North. The current population of Artesia is 13,500. Artesia furnishes municipal water to its residents and to about 1000 persons outside the City limits. In addition, the City sells water to oil refineries near Artesia. The City relies exclusively on groundwater from eight artesian wells.

## 3. Village of Capitan:

The Village of Capitan is located between Bonito Creek and Salado Creek, both tributaries of the Hondo River, which is the principal tributary of the Pecos, in Lincoln County, New Mexico. Its current population is estimated at between 1200 and 1300. The Village provides municipal water to all those persons through 658 water meters within the village and 10 meters outside the village limits. As a member of the Eagle Creek Inter-Community Water Users Association, the village has Eagle Creek as its principal source of water. The village is actually supplied water through the Bonito Pipeline, owned and controlled by the City of Alamogordo. The village compensates the City of Alamogordo by pumping from Eagle Creek into the Bonito Pipeline an amount of water equal to the amount received through the pipeline. Because Alamogordo can terminate this arrangement at almost any time, the village has obtained an adjudicated groundwater right to appropriate 75 acre feet per year. In view of the somewhat tenuous arrangement with the City of Alamogordo, the village will be relying more and more in the future on its groundwater right to supply domestic, sanitary and other municipal water to the present and future residents of the village.

## 4. Village of Pecos.

The Village of Pecos is located on the Pecos River in the upper reaches of its drainage in San Miguel County, New Mexico. The present population of the village is 1,050, all of whom receive their water through the municipal system. The water rights of the village have not yet been adjudicated in the *L. T. Lewis* case, *supra*. The village owns four wells which are



authorized to divert a total of 198.39 acre feet per annum. Recent contamination problems in some of the wells has substantially reduced the actual availability of water.

5. City of Roswell:

Roswell is located on the Hondo River in Chaves County, New Mexico. Its current population is about 45,000, making it one of the largest cities in the State of New Mexico. It supplies municipal water to all its inhabitants through a municipally owned system. The city obtains water from 10 artesian wells located around the city. These rights have been provisionally adjudicated in the *L.T. Lewis* case *supra*. See, *State ex rel., Reynolds vs. Crider*, 431 P.2d 45, 73 N.M. 312 (1967). The city has the right to appropriate a total of 23,458.56 acre feet per annum.

6. Village of Ruidoso:

The Village of Ruidoso is located on the Rio Ruidoso, a tributary of the Rio Hondo, the principal tributary of the Pecos, in Lincoln County, New Mexico. Its estimated population is 10,000, many of whom are not year-round residents, but who are connected to the municipal water supply system. A total of 6,683 water meters are served within the municipal limits. Approximately 90% of the 621,000,000 gallons delivered in 1985 was for domestic and sanitary use. The water rights of the village have been provisionally adjudicated in *L.T. Lewis, supra*. The village has rights to 249 acre feet per year from the Rio Ruidoso and several wells within the village. The village also belongs to the Eagle Creek Inter-community Water Users Association and thereby appropriates water from Eagle Creek into the municipal water supply system. The water is ultimately discharged to the Rio Ruidoso as wastewater from the village's sewage treatment plant. The Village then receives an effluent water credit for Eagle Creek, which in turn is utilized to divert an equal amount of water from the Rio Ruidoso. The village's Eagle Creek effluent credit usually constitutes 65-70% of the total amount of water available to the village to meet its needs.

7. The Village of Ruidoso Downs:

The Village of Ruidoso Downs is also located on the Rio

Ruidoso immediately east of the municipal limits of the village of Ruidoso. The current population is 1500 persons, all of whom are provided municipal water. The water rights of the village include the right to divert one-half of the flow of Hale Springs, up to 175 gallons per minute.

As its primary supply the village relies on two wells from which it is entitled to pump a total of 31 acre feet. These wells were initially adjudicated in the *L. T. Lewis* case for commercial use and later transferred to the village for municipal purposes.

#### 8. The City of Santa Rosa:

The City of Santa Rosa is located on the upper reaches of the Pecos River mainstem in Guadalupe County, New Mexico. Its present population is 2,800, all of whom receive domestic and sanitation water through the municipal system. Santa Rosa's water rights have not yet been adjudicated in *L. T. Lewis, supra*, although the city is a recently named defendant. Its wells are recognized as having a total combined water right of 1366.89 acre feet per year.

#### B. Detriment to *Amici Curiae*.

The Special Master's Report (p. A-1) recommends that New Mexico deliver to Texas a total of 340,100 acre feet over a period of ten years at a minimum rate of 34,010 acre feet per year. New Mexico would have three years in which to commence performance of this minimum delivery requirement.

In addition, the Report recommends that New Mexico meet its annual requirement to Texas under the Pecos River Compact, Article III(a). In order to meet this requirement alone, New Mexico must deliver an average of 10,000 acre feet per year more than it has been able to deliver in the past. Total state line deliveries have averaged about 75,500 acre feet per year (p. 31).

Article IX of the Compact requires that the State of New Mexico maintain flows at the state line by application of the doctrine of prior appropriation. Article XVI, §2 of the New Mexico Constitution mandates that priority in time gives the better right to the use of the public waters.

New Mexico municipalities are bound by the prior

appropriation doctrine. Should this Court affirm the Special Master's report and adopt his recommended decree, total loss or severe curtailment of the water rights of the *amici* during the ten year repayment period will result. Effects upon the municipalities will not be uniform. It is evident, however, that to the extent these municipalities are required to forego existing water rights on which they rely for their municipal systems, they will be forced to seek acquisition of other, more senior rights. Great practical as well as economic difficulties will surely result. The effect upon one of the most basic services the municipalities provide for the health and general welfare of their residents promises to be severe.

Administration of the prior appropriation system, where, as here, there are vested, non-permitted rights, dating from before the era of statutory control of water rights (New Mexico statutory control of water rights began in 1907, See Ch. 49, N.M. Laws of 1907) depends upon priority of right, which in turn, depends upon adjudication of that priority by a court. See, *State v. Pecos Valley Artesian Conservancy District*, *L.T. Lewis, et al.*, 99 N.M. 699, 663 P.2d 358 (1983).

The Pecos River adjudication, (*L.T. Lewis, supra*), involving some 6,000 defendants has been proceeding on the Pecos River since 1978, having begun in the Roswell basin in the mid-1950s and subsequently expanded. In the absence of judicial determination of priorities, administration is not possible. It is also not possible for a municipality or any other water user to determine (a) whether it must acquire further water rights; (b) what water rights will be usable during a priority administration; (c) whether rights it might acquire will, in time of physical shortage of water, actually supply municipal demands.

The Southwest and particularly southeastern New Mexico is in a particularly delicate economic condition. For decades the economic lifeblood of the area has been the oil and gas industry. That industry is particularly depressed. Thus, the statistics shown in Texas Exhibit 101 are misleading, as they reflect an economy which no longer exists. The situation would be unbearably exacerbated by a requirement that the municipalities acquire new water rights to substitute for water rights they already have. In ordinary circumstances their present water rights would serve all their purposes quite well.

## SUMMARY OF ARGUMENT

Hardship on *amici* and the public will be severe if the Court requires a water payback recommended by the Special Master. Hardship is a proper consideration in determining relief in favor of one state against another. The water rights of municipalities, up to 31,000 acre feet, will be cut off by adoption of the Master's decree. The Master's recommended decree fails to observe the considerations set forth by this Court in *Colorado v. Kansas*.

The Court is without jurisdiction under the Eleventh Amendment to require New Mexico to pay back past short deliveries of water under the Pecos River Compact. This limitation does not affect the ability of the Court to issue appropriate injunctions for prospective relief.

The Special Master erroneously created a contractual remedy of "payback" for Pecos River Compact underdeliveries. The Pecos River Compact is more properly construed as a federal law and not a contract. Contract remedies should therefore be unavailable. Remedies may be inferred from federal laws only if the test of *Cort v. Ash* is satisfied. The remedy of a water "payback" does not meet that test.

### POINT I

#### HARDSHIP ON *AMICI*, WILL BE SEVERE IF THE COURT REQUIRES A PAYBACK. HARDSHIP IS A PROPER CONSIDERATION IN DETERMINING RELIEF IN FAVOR OF ONE STATE AGAINST ANOTHER

The effect of the Special Master's recommended decree will be to shut off most of the present water rights of these municipalities. (Tr. 34-41, 5/20/86.) Additionally, most water rights of non-municipal users for industrial and like uses within as well as outside of the cities, will suffer a like fate. The Special Master's decree would also shut down any junior non-irrigation rights as well as 170,000 acres of irrigation, approximately 90% of the total, most of which would gradually be restored to use (*id*; N.M. Ex. 123).

There is no preference in New Mexico water law for municipalities. nor are they immune from priority administration. *City of Raton v. Vermejo Conservancy District*, 101 N.M. 95, 678 P.2d 1170 (1984). The record indicates the Special Master was not aware of this. (See Tr. 104, May 20, 1986.) He was aware of the extent of municipal rights (31,000 acre feet). See Tr. 41, 42, 5/20/86.

The Special Master has overlooked the inherent obligation of an equitable remedy to weigh the hardship and inconvenience to the affected public. Cf. *City of Harrisonville, Mo. v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334 (1933). The Special Master should have considered the disastrous effects of his recommendations upon New Mexico water users, including municipalities. This he did not do, as discussed, *infra*.

The Special Master says curtailment of water rights in New Mexico is not the only way she can deliver prior short deliveries to Texas. He suggests that New Mexico can purchase or condemn rights and then pump water into the river and curtail diversions of surface water in order to make water available to Texas to repay the past short deliveries. He further suggests shutting down all or part of the Carlsbad Irrigation District, see Report, p. 35:

...the Carlsbad Irrigation District alone diverted during the 1950-1983 period an average of 60,000 acre feet per year from the river (Tr. 86, 5/20/86). Thus it is clear that New Mexico has other means of meeting a delivery obligation than curtailment of pumpage by junior rights holders in the Roswell Basin.<sup>1</sup>

This simplistic approach overlooks the claimed 1887 priority of the Carlsbad Irrigation District, because Carlsbad could not

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<sup>1</sup> While cities may be legally able to condemn water rights with priorities sufficient to withstand the priority administration necessary to deliver water to Texas under the decree, current law does not permit the State to do so. The Special Master's citation and analysis of *Kaiser Steel Corporation v. W.S. Ranch Company*, 81 N.M. 414, 467 P.2d 986 (1970) for the proposition that the state may condemn water is wrong: the case stands for the proposition that pursuant to §72-1-5, N.M.S.A., 1978, private corporations or persons in New Mexico can, by condemnation, obtain *rights of way* to transport water they already own.



be shut down without shutting down all junior water users. See N.M. Const., art XVI, §2: "\*\*\*Priority of Appropriation shall give the better right." Article IX of the Pecos River Compact requires adherence to that principle as well:

In maintaining the flows at the New Mexico-Texas state line required by this compact, New Mexico shall in all instances apply the principle of prior appropriation within New Mexico.

The oldest substantial block of water rights on the Pecos is in the Carlsbad Irrigation District. Those rights were adjudicated in the 1930s to the United States and it is not clear that they are subject to condemnation. Further, it is likely that these rights will be shut down as a part of priority administration. Tr. 34-41, 5/20/86. Absent a determination that the cities would be left with water in a priority administration, this Court should not order a payback which must, under the compact, be exacted in conformity with the law of prior appropriation. To do so would create a tremendous hardship on the municipalities.

Until the *inter se* portion of the adjudication is completed *State v. Pecos Valley Artesian Conservancy District, et al.*, *supra*, 99 N.M. at 701, *State ex rel., Reynolds v. Sharp*, 66 N.M. 192, 344 P.2d 943 (1959) even the priority of the Carlsbad Irrigation District will not have been finally adjudicated. The case just cited holds that in New Mexico due process requires that each water right owner be given the opportunity in the adjudication process to challenge *inter se* the rights provisionally adjudicated to any other water right owner in the stream system. Only after that opportunity has been afforded is the adjudication complete. The *inter se* phase of the adjudication cannot occur until there has been a provisional adjudication between the state and the individual water users. That process, by which the rights of some 3,000 water rights claimants have been provisionally determined, is nearing completion, with the rights of another 3,000 defendants awaiting hydrographic survey and provisional determination. Included in the rights as yet unadjudicated are the rights of at least two of your *amici*, the City of Santa Rosa and the village of Pecos. The rights of the other municipalities are provisionally determined, but remain subject to *inter se*



challenge. All parties may assert *inter se* challenges to the provisional adjudications of other defendants when the action is ripe for that process.

The Carlsbad Irrigation District claims a priority of 1887. Until the *inter se* portion of the adjudication is completed, however, municipalities and other parties are not bound thereby and are entitled to challenge that priority.

If the Court should order a payback to Texas, the effect of the payback provision could be to require municipalities to acquire water they do not need. They would have to assume that the Carlsbad Irrigation District priority will be 1887, and acquire other rights with priorities earlier than 1887. However, as a result of an *inter se* challenge, for example, which results in a holding that the Carlsbad priority is not 1887, but, e.g., 1905, a city whose water rights have a 1900 priority would have expended immense amounts of money acquiring water rights with earlier priority dates than they need, and which are, accordingly, more expensive than necessary. Therefore the Court should allow New Mexico a reasonable time to sort out the complexities imposed by the prior appropriation system.

*Colorado v. Kansas*, 320 U.S. 383 (1943), was a non-compact equitable apportionment case, in which this Court had previously heard litigation between the same states on essentially the same issues. Kansas claimed that Colorado substantially and injuriously aggravated the conditions which existed at the time of the earlier suit.

This Court stated:

We come now to the vital question whether Kansas has made good her claim to relief founded on the charge that Colorado has, since our prior decision, increased depletion of the water supply to the material damage of Kansas' substantial interests. The question must be answered in the light of rules of decision appropriate to the quality of the parties and the nature of the suit.

*In such disputes as this, the court is conscious of the great and serious caution with which it is necessary to approach the inquiry whether a case is proved.* Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the actions of a state, for the burden on the complaining state is much

greater than that generally required to be borne by private parties. Before the Court will intervene *the case must be of a serious magnitude and fully and clearly proved*. And in determining whether one state is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one state or the other must be weighed as of the date when the controversy is mooted.

On this record there can be no doubt that a decree such as the Master recommends...would *inflict serious damage on existing agricultural interests in Colorado. How great the injury would be it is difficult to determine, but certainly the proposed decree would operate to deprive some citizens of Colorado, to some extent, of their means of support. It might indeed result in the abandonment of valuable improvements and actual migration from farms*. Through practice of irrigation, Colorado's agriculture in the basin has grown steadily for fifty years. With this development has gone a large investment in canals, reservoirs, and farms. The progress has been open. The facts were of common knowledge.

...it is...evident that while improvements based upon irrigation went forward in Colorado for twenty-one years, Kansas took no action until Colorado filed the instant complaint in 1928.

*These facts might well preclude the award of the relief [injunction] Kansas asks. But, in any event, they gravely add to the burden she would otherwise bear, and must be weighed in estimating the equities of the case.*

320 U.S. at 393. (Emphases added.) No relief, retroactive or prospective was granted by the Court to Kansas under the facts in that case. Here the facts are even more compelling for denial of retroactive relief. The delay exceeds that in *Colorado v. Kansas, supra*, the "serious damage" to agricultural and other interests is comparable if not more severe. Here the relief recommended is substantially more harsh than that recommended by the Special Master in *Colorado v. Kansas, supra*, where it was recommended that *prospectively* Colorado have 5/6 and Kansas have 1/6 the "average annual dependable and fairly continuous water supply and flow" of the Arkansas River. Even that relief was rejected by the Court as too harsh. Far beyond

simple injunctive relief, the Special Master here has proposed a payback in kind in the nature of damages. *Amici* suggest that under the circumstances such relief is too harsh.

This Court's discussion in *Colorado v. Kansas, supra*, respecting burden of proof, and the Court's determination to consider factors outside of strict appropriation and equitable apportionment considerations are applicable to this case as well. It is much more painful to shut down or squeeze down an existing economy than one that never came into being (p. 96, Tr. 4/16/86). The willingness of the Court in *Colorado v. Kansas, supra*, to consider injury to the defendant and its inhabitants even though it was difficult to determine is significant here in light of the Special Master's statement that "While New Mexico will undoubtedly suffer some economic loss from being required to deliver water to Texas, the amount is too speculative to quantify."

The Special Master's report indicates a seemingly very small impact on the two counties principally impacted by his decision (p. 34):

...the economic loss to New Mexico for one of the scenarios presented, i.e., a delivery to Texas of 20,000 acre-feet per year...is equal to less than one percent of non farm income for the Roswell Basin.

Obviously, the impact on the non-farm economy is not going to be as great as the impact on the farm economy. The impact on the farm economy in the Roswell Basin will be tremendous. These communities depend in the long term on the farming economy. Additionally, there are non-farm water uses which will be directly and substantially impacted. *Amici* are the principal non-farm water users, but there are others as well. The Special Master failed entirely to notice these defects in the basis for Mr. Wright's testimony.

The Special Master failed to take notice of the result if all 31,000 acre feet of municipal uses were required to be replaced with pre-1887 rights at, e.g., \$5,000.00 per acre foot. The result is \$155,000,000.00, which remains, for New Mexico municipalities, a meaningful sum. If there is (as there must be) a direct impact on other non-agricultural rights, then the result is a many

fold increase in the percentage of income affected by the Court's action. See Tr. 383, 5/20/86.

## POINT II

### THE COURT IS WITHOUT JURISDICTION UNDER THE ELEVENTH AMENDMENT TO REQUIRE NEW MEXICO TO PAY BACK PAST SHORT DELIVERIES OF WATER UNDER THE PECOS RIVER COMPACT.

Under the Eleventh Amendment to the United States Constitution, this Court is without jurisdiction to entertain actions against a state by citizens of another state.

The Eleventh Amendment reads:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

This Court has previously held that included in the jurisdictional limitation of the Eleventh Amendment are suits brought in the name of the state for the direct benefit of some of its citizens. *North Dakota v. Minnesota*, 263 U.S. 365 (1923). In general there is a distinction in original actions lying between suits brought on the one hand in the sovereign interest of the state as *parens patriae* of its citizens and on the other hand as a sovereign presenting and enforcing individual claims of its citizens as their trustee against a sister state. Only the former can be maintained consistently with the Eleventh Amendment.

In *North Dakota v. Minnesota*, *supra*, this Court said that where a drainage system built by Minnesota increased the flow of an interstate stream so that the water flooded farms in North Dakota, the latter state had "such an interest as quasi-sovereign in the comfort, health, and prosperity of its farmers that resort may be had to this Court for relief." In addition to an injunction, however, North Dakota requested a decree against Minnesota for damages of \$5,000 for itself and \$1,000,000 for its

inhabitants whose farms were injured. The Court said it could not award North Dakota damages for the benefit of such individuals in view of the Eleventh Amendment.

The Court said:

The right of a state as *parens patriae* to bring suit to protect the general comfort, health, or property rights of its inhabitants, threatened by the proposed or continued action of another state, by prayer for injunction, is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee against a sister state. For this reason the prayer for a money decree for the damage done by the floods of 1915 and 1916 to the farms of individuals in the Bois de Sioux valley, is denied, for lack of jurisdiction.

263 U.S. at 375, 376. See 3 Hutchins, *Water Rights Laws in the Nineteen Western States* 73, et seq.

Compare this Court's statement in *North Dakota v. Minnesota*, that "Indeed, it is inconceivable that North Dakota is prosecuting this damage feature of its suit without intending to pay over what it thus recovers to those entitled," with the statement of counsel for Texas in argument before the Special Master, April 16, 1986, p. 40:

SPECIAL MASTER: Are you willing to take money?

MR. HICKS: I think that we are willing to think about it and discuss it. One of the problems that we have, of course, is, the prime beneficiaries of the water coming down are the farmers of the Pecos River Basin. If money comes to Texas there is certain to be a battle over where the money goes and what account it goes into, especially since Texas is now in somewhat of a budget crisis because of the oil situation....

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...we do have a lot of the prime beneficiaries of the relief in water that we have to consider. We just haven't started balancing how that might be done.

More recently, this Court has distinguished invasion of the property of a state (usually its money) to assure future compliance with a substantive federal law from attempts to invade the State's property to compensate those adversely affected in the past by the State's actions. *Edelman v. Jordan* 415



U.S. 651 (1975). Such retrospective relief is expressly barred by the Eleventh Amendment. *Id.*; *Quern v. Jordan*, 440 U.S. 332 (1979)

New Mexico's water is not substantially different from her money, either as a matter of quality or quantity. It is the property of the State (N.M. Const., art. XVI, §2), and there is not an excessive amount of either. Simply stated, the Special Master is recommending that this Court invade the property of the State of New Mexico to pay past "water debts" for the benefit of specific citizens of Texas.

In *Colorado v. New Mexico (I)*, 459 U.S. 183 (1982), this Court held the Eleventh Amendment to be no bar to the assertion of rights to *future* diversions pursuant to equitable apportionment. This case is different. Here the question is whether the Eleventh Amendment bars the award of "water damages" for *past* underdeliveries, the sole purpose of which is to benefit a small number of downstream water users. The Eleventh Amendment does constitute a bar.

The Eleventh Amendment does not bar injunctive relief to enjoin future compliance, if it is found that there have been underdeliveries in the past. It only bars the remedy of payback. Therefore the Master's recommendation requiring a payback of water must be rejected.

It is evident that if Texas' claim were for money, she could only legitimately recover that money which would go to the benefit of all her citizens, for example by being paid to the State's treasurer and distributed by a corresponding reduction in the tax burden on all the citizens. In that circumstance, Texas would be acting in her *parens patriae* capacity. Examination of the statements of counsel for Texas establish that Texas is in fact attempting to present and enforce damage claims of its individual citizens against New Mexico.

To award Texas "water damages" for crop loss on behalf of the witness Walker or her parents or grandparents (Tr. 5/21/86, pp. 385, 386, 399) or for any other water user or erstwhile water user, such as the Master has recommended, in excess of current obligations, is barred by the jurisdictional limitations of the Eleventh Amendment. That amendment prohibits invasion of the State's property in an attempt to compensate individuals adversely affected in the past by the State's action.

### POINT III

#### THE SPECIAL MASTER ERRONEOUSLY CREATED A REMEDY OF PAYBACK FOR PECOS RIVER COMPACT UNDERDELIVERIES

##### A. The Pecos River Compact is More Properly Construed as a Federal Law Than As a Contract. Contract Remedies Should Therefore Be Unavailable.

Although the Special Master stated in his Report (p. 39) that a compact is in effect a contract between two states, this does not appear to be the best interpretation upon closer analysis. He cites *West Virginia ex rel. Dyer v. Simms*, 341 U.S. 22 (1951), for his proposition. A close reading of that case, however, reveals that it was concerned with whether certain provisions of the West Virginia Constitution barred compliance with the Ohio Valley Sanitation Compact. The majority asserted the Court's power to interpret the West Virginia Constitution under such circumstances and held that the West Virginia constitutional provisions did not bar compliance with the compact. The question whether the compact was a contract or a federal statute was not addressed.

On the other hand, we have authority more to the point and much closer to home: the most recent opinion in this proceeding, *Texas v. New Mexico*, 462 U.S. 554 (1983), wherein Mr. Justice Brennan, speaking for a unanimous court, rejected the recommendation of the previous Special Master to have the Pecos River Compact in effect considered to be a contract and to be subject to the contractual remedy of reformation, specifically to change the voting rules for the Pecos River Commission. Justice Brennan responded to the recommendation as follows:

Under the Compact Clause, two States may not conclude an agreement such as the Pecos River Compact without the consent of the United States Congress. However, once given, "*congressional intent transforms an interstate compact within this clause into a law of the United States.*" *Cuyler v. Adams*, 449 U.S. 433 (1981); see *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518, 566 (1852).



One consequence of this metamorphosis is that unless the compact to which Congress consented is somehow unconstitutional, no court may order relief inconsistent with its express terms.

462 U.S. at 564 (Emphasis added.) Thus, this Court has rejected already in this case the notion that the Pecos River Compact is a contract subject to contractual remedies such as reformation. The general rule and the law of this case are that once the Pecos River Compact was consented to by Congress, it became a federal law. The compact was transformed from an agreement between states into a law of the United States.

The remedy sought to be imposed by the Special Master must be inferred from the statute itself or its legislative history and not from the panoply of common law remedies that exist in contract cases, which is the method by which the Special Master reached his conclusion. The remedy, in other words, must be found within the statute and cannot be brought in from without the statute because the Compact is a federal law, not a contract.

**B. Remedies May Be Inferred From Federal Laws Only If The Test of *Cort v. Ash* Is Satisfied. The Remedy of a Water Payback Does Not Meet That Test.**

In *Cort v. Ash*, 422 U.S. 66 (1975), this Court set out a four-part test for determining whether a remedy in favor of someone other than the Federal government is implicit in a statute not expressly providing one. Briefly, those factors are: (1) whether the plaintiff is one of the class for whose special benefit the statute was enacted; (2) whether there is an indication of legislative intent, explicit or implicit, to create such a remedy or to deny one; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and (4) whether the cause of action is one traditionally relegated to State law. 422 U.S. at 78.

The two central factors in the present inquiry are the second and third, namely, whether there is any indication of *legislative* intent, explicit or implicit, either to create such a remedy or to deny one and whether it is consistent with the underlying

purpose of the legislative scheme to imply such a remedy for the plaintiff. Analysis of these factors requires reference to the compact itself and to its legislative history.

The Court has had occasion recently to discuss these two principles stating:

And "unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Northwest Airlines, Inc., the Transport Workers*, 451 U.S. 77 (1981). "The federal judiciary will not ingraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California Sierra Club*, 451 U.S. 287, 297 (1981).

*Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. \_\_\_, 87 L.Ed.2d 96, 105 (June 27, 1985).

It is very significant that just ten years before the signing of the Pecos River Compact, the same two states signed and the U.S. Congress approved the Rio Grande Compact, which clearly provides for payback of accrued debits. *See* arts. I, VI, VII, Rio Grande Compact, §72-15-23, N.M.S.A., 1978; 53 Stat. 785 (1939). This is a clear indication that when Texas and New Mexico and the U.S. Congress omitted any reference to accrued debits and credits in the Pecos River Compact, they did so advisedly, being aware that they had a common history of providing expressly for accrual of debits and credits when it was their intention that there should be paybacks.

The analysis of the legislative history of the Compact by the State of New Mexico in its brief further confirms that no remedy of payback was intended by Congress. Therefore the payback remedy would appear to fail the second and third tests of *Cort v. Ash*, *supra*.

In addition to the persuasive statutory interpretation under *Cort v. Ash*, *supra*, it is appropriate to consider the additional reasoning of the Special Master in inferring a damage remedy.

The Special Master reasoned that New Mexico's position cannot be reconciled with the Court's order to the Special Master to determine for the period 1962 to the present New Mexico's

negative departure from its 1947 condition obligation. (Report, 39-40.) He says that no purpose would be served in spending considerable resources to determine the amount of past shortfalls if no remedies are available for the deficiency. On the contrary, a very real and necessary purpose is served by determining the amount of past shortfalls. That purpose is the need to determine, for the future, the average amount of additional water that needs to be provided at the state line. As the Special Master says, the amount of water due to Texas every year depends on factors that change every year.

Compliance in each and every year cannot be hoped for. As the Special Master points out very graphically, "the 1947 condition is a moving target, changing from year to year depending upon the amount of flood inflows into the Pecos River." (Report, p. 41.) The best that can be hoped for under these difficult circumstances is that there will be an average compliance over a number of years. Logically, then, in order to achieve average-year compliance with the Compact, the average by which flows undershoot the 1947 condition must be known. Without those calculations, it would be impossible to determine by what amount the State of New Mexico must increase its state line flows to come into compliance with the Compact. This would appear to be the reason that calculation of past shortfalls was required by this Court.

The Special Master also reasons that relief consisting solely of prospective compliance with Article III(a) of the Compact would be illusory. (Report, pp. 40, 41). His position appears to grow out of a confusion between the payback and the method for determining compliance. He asserts that the delivery obligation in one year is unrelated to the following year's obligation. While this is true, it does not seem to support his position that payback of past underdeliveries is the only non-illusory remedy available. In other words, the Special Master is correct that the obligation is not one that can be adjusted from year to year. But this does not support his position that paybacks must be required. Rather, it supports the proposition that compliance *vel non* must be judged over a long period and New Mexico should only be enjoined to bring its state line deliveries to an amount which would remove any average underdelivery. Average compliance is still very practical and constitutes a very real remedy under the

Compact, a remedy which, one might add, if the Special Master's finding that negative departures were caused by man's activities in New Mexico is accepted, will impose a great deal of hardship on New Mexico water users.

### CONCLUSION

The Special Master has imposed a remedy upon New Mexico which not only violates the Eleventh Amendment to the United States Constitution, but would impose a severe hardship upon New Mexico water users in a manner and by means of a remedy not contemplated by the Congress in consenting to the Pecos River Compact. Clearly this Court can require future compliance with the Compact by New Mexico authorities. The result envisioned by the Special Master, however, is countenanced neither by federal law nor the decisions of this Court.

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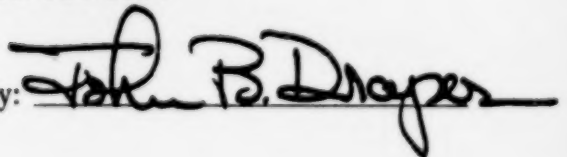
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A handwritten signature in black ink, appearing to read "John B. Draper", written over a horizontal line.

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## **CERTIFICATE OF SERVICE**

We, the undersigned, hereby certify, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, that we are members of the Bar of this Court and are counsel of record for the Amici Curiae named in the foregoing Joint Brief of Amici Curiae in Support of the Position of the State of New Mexico, and that on the 17<sup>th</sup> day of December, 1986, we caused to be deposited the foregoing Joint Brief of Amici Curiae in the United States Post Office with first class postage prepaid, addressed to counsel of record as follows, being all counsel and parties required to be served:

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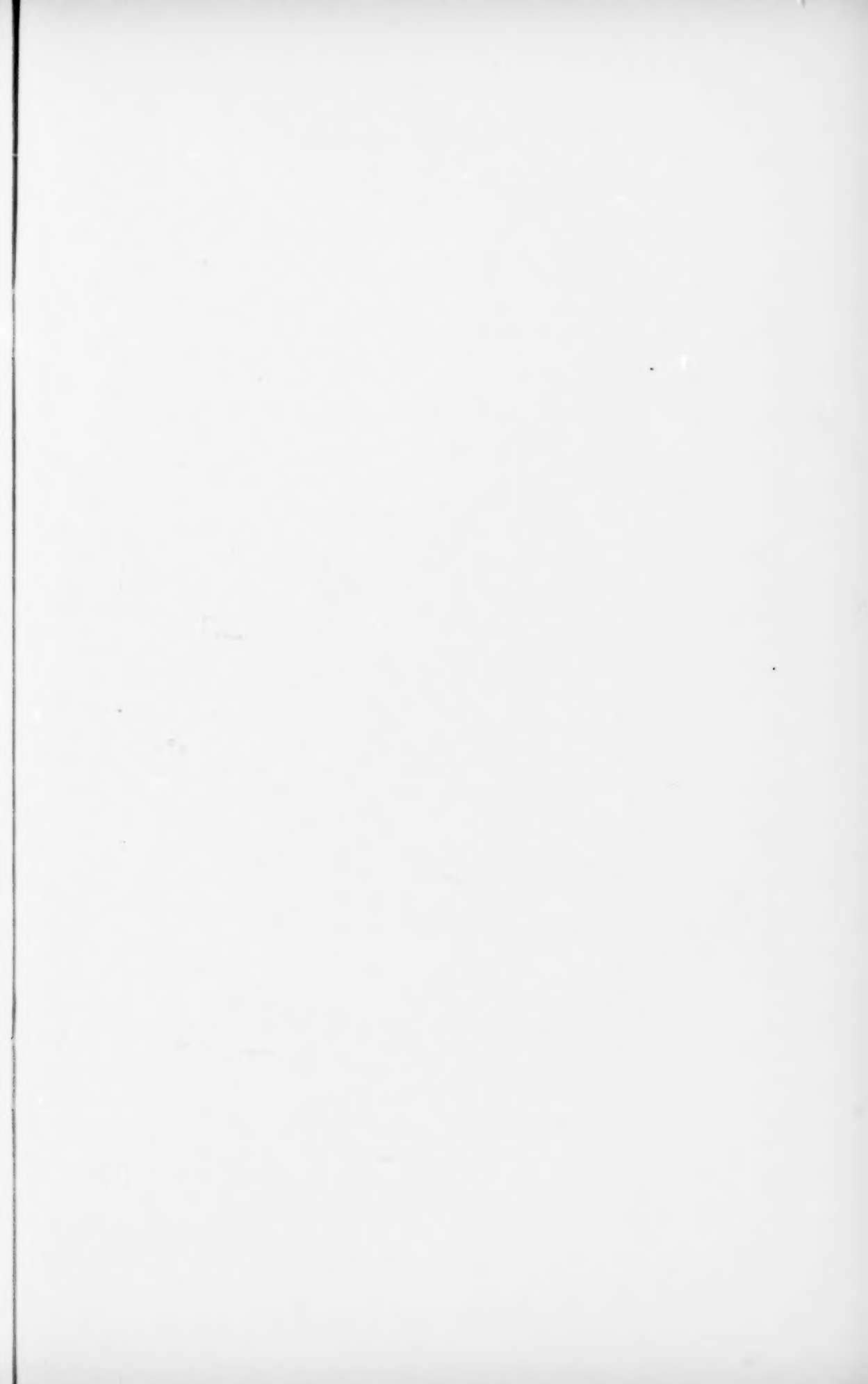
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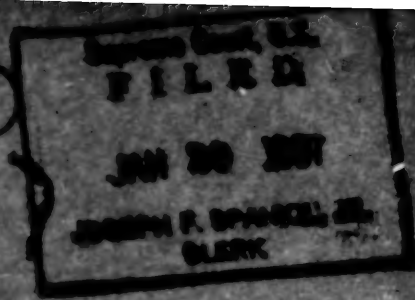
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No. 65 Original



In The  
Supreme Court of the United States

October 10, 1986

The State of Texas,  
Plaintiff

vs.

The State of New Mexico,  
Defendant

and

United States of America,  
Intervenor

Brief of Amicus Curiae  
Red Bluff Water Power Control District  
In Support of the Recommendations  
of the Special Master

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## Table of Contents

<u>Description</u>	<u>Page</u>
TABLE OF CONTENTS.....	i, ii
TABLE OF AUTHORITIES.....	iii
INTRODUCTION AND STATEMENT OF INTEREST OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF ARGUMENT.....	4
POINT I.....	5
Potential hardship to <i>Amici</i> should not prohibit the Supreme Court of the United States from granting the relief recommended by the Special Master	
POINT II.....	10
Granting the relief recommended by the Special Master would not violate the Eleventh Amendment.	
POINT III.....	13
The Special Master's remedy of payback is a proper remedy for New Mexico's departure from the terms of the Pecos River Compact.	

<u>Description</u>	<u>Page</u>
A.....	13
The Pecos River Compact is a contract between the State of Texas and the State of New Mexico with the authority of federal law.	
B.....	16
The repayment remedy recommended by the Special Master is an appropriate remedy for New Mexico's departure from the Pecos River Compact and is a valid application of contract damages.	
CONCLUSION.....	18

## Table of Authorities

<u>Description</u>	<u>Page</u>
<b>CONSTITUTIONAL PROVISIONS</b>	
U.S. CONST., Amend. XI.....	5,11,12
<b>INTERSTATE COMPACTS</b>	
Pecos River Compact, Article VIII.....	12
<b>CASES</b>	
<i>Colorado v. Kansas</i> , 206 U.S. 46, 117 (1907).....	6,13
<i>Colorado v. Kansas</i> , 320 U.S.383 (1943).....	6,7,8
<i>Colorado v. New Mexico</i> , 459 U.S. 176 (1982).....	13
<i>Cort v. Ash</i> , 422 U.S. 66 (1975).....	16
<i>Green v. Biddle</i> , 8 Wheat (21 U.S.) (1823).....	15,17
<i>Kentucky v. Indiana</i> , 281 U.S. 163, (1930).....	16,17
<i>North Dakota v. Minnesota</i> , 263 U.S. 365 (1923).....	11
<i>Sporhase v. Nebraska</i> , 458 U.S. 941, 956-957 (1982).....	13
<i>Texas v. New Mexico</i> , 462 U.S. 554, 564 (1983).....	15
<i>Texas Water Rights Commission v. Wright</i> , 464 S.W.2d 642 (1971).....	12
<i>Virginia v. West Virginia</i> , 246 U.S. 565 (1917).....	17
<i>West Virginia ex. rel. Dyer v. Sims</i> , 341 U.S. 22 (1951).....	14



STATUTES

TEX. WATER CODE ANN. chapter 11, subchapter G (Vernon Pamph. Supp. 1987).....	1
TEX. WATER CODE ANN. § 11.021-11.022, 11.121 (Vernon Pamph. Supp. 1987).....	11,12
TEX. WATER CODE ANN. 11.025 (Vernon Pamph Supp. 1987).....	12

## **INTRODUCTION AND STATEMENT OF INTEREST OF *AMICUS CURIAE***

### **A. *Amicus Curiae***

*Amicus Curiae*, Red Bluff Water Power Control District, is a political subdivision of the State of Texas created in 1934. By virtue of a "Master Contract" executed in March, 1934, Red Bluff Water Power Control District is composed of, and has succeeded to the water rights of, Loving County Water Improvement District No. 1, Reeves County Water Improvement District No. 2, Ward County Water Improvement Districts Nos. 2 and 3, Ward County Irrigation District No. 1, and Pecos County Water Improvement Districts Nos. 2 and 3. Red Bluff Water Power Control District is the owner and operator of Red Bluff Reservoir, a 300,000 acre-foot capacity reservoir constructed in 1936 and located approximately ten miles south of the Texas-New Mexico state line on the Pecos River. The Pecos River and Red Bluff Reservoir are the sole source of water for irrigation in the counties served by Red Bluff Water Power Control District and its member districts.

Texas adjudicated the water rights of Red Bluff Water Power Control District in 1985. The adjudication is based on legal development of the water rights and the extent to which they have been exercised. The proceedings were conducted pursuant to the Water Rights Adjudication Act, TEX. WATER CODE ANN. chapter 11, subchapter G (Vernon Pamph. Supp. 1987). To summarize Red Bluff Water Power Control District's water rights as finally determined, they are:

a. The right to maintain Red Bluff dam and reservoir on the Pecos River and impound therein 300,000 acre-feet of water for irrigation and hydroelectric generation purposes, and;

b. The right to divert and use water for irrigation to the extent of 292,500 acre-feet per annum to irrigate 145,000 acres of land, which water may come either from releases from the reservoir or from inflows originating below the dam.

#### B. Detriment to *Amicus Curiae*

In the years prior to and after the completion of the Red Bluff reservoir, extensive irrigated farming activities were conducted on the land served by the Red Bluff Water Power Control District and its member districts. Lush crops of cotton, alfalfa, and vegetable crops were raised in the areas irrigated by the districts and the agricultural economy flourished. (Tr. 389-391, 5/21/86). Between 1934 and 1939 an average of 19,981 acres of land were irrigated with water furnished by the Red Bluff Water Power Control District, with 32,028 acres of land being irrigated in 1940. (Tx. Ex. 11a, tables 76, 83).

On December 3, 1948 the State of Texas and the State of New Mexico signed the Pecos River Compact in order to resolve existing and future controversies and to divide and apportion the water of the Pecos River. The State of New Mexico agreed that it would not deplete by man's activities the flow of water in the Pecos River at the Texas-New Mexico state line below the amount which would give to Texas the quantity of water equivalent to that available to Texas under the

"1947 condition." As stated by the Special Master, "the bargain struck in the Compact allowed New Mexico to retain the benefits of past development in the Pecos River Basin during the pre-Compact period. Sen Doc. 109, Stip. Exh. 1 at 3-8. But in return, New Mexico had to forego increased uses by man after 1947." Despite the agreement, as found by the Special Master, New Mexico did not keep its side of the bargain.

The Special Master has determined that the State of New Mexico has, over a period of years, breached her duties under the Pecos River Compact by permitting and countenancing prohibited depletions by man's activities of the waters of the Pecos River, such that there has been a cumulative reduction in the quantity of water that New Mexico had compacted to deliver to the Texas-New Mexico state line. The Special Master concluded that the total negative departure from the 1947 condition resulting from man's activities and chargeable to New Mexico, for the period from 1950 to 1983, was 340,000 acre-feet of water and has recommended that New Mexico deliver to Texas that quantity of water over a period of ten years, at a minimum rate of 34,010 acre-feet per year.

Red Bluff Water Power Control District, its member districts, and their constituents have been significantly affected by the actions of the State of New Mexico which have been contrary to the obligations imposed by the Pecos River Compact. These activities and departures have significantly lessened inflows of water in the Pecos River and have reduced the firm yield of Red Bluff Reservoir, resulting in a substantial

impairment to the agricultural economy in the four counties served by Red Bluff Water Power Control District and its member districts. (Tx. Ex. 79; Tr. 397-399, 5/21/86; Special Master's Report at 30).

Numerous persons in these counties have suffered serious economic losses due to the lack of water to irrigate farmland, and thousands of acres of land which were once green with irrigated crops are now no more than dusty fields. (Tr. 397-399, 5/21/86). In at least one of the districts, Ward County Water Improvement District No. 3, no farming activities have been conducted at all in recent years due to the lack of water, although the district has maintained its headgates and diversions facilities in anticipation of the time when water would again flow from New Mexico. (*Id.* at 400-401). Depressed conditions and economic hardship in the counties served by the Red Bluff Water Power Control District, caused by New Mexico's departure from the 1947 condition, would be improved if New Mexico were required to comply with the agreements it entered into when it signed the Pecos River Compact, and to repay what it has kept from Texas from 1950 to 1983. (Tr. 404-405, 5/21/86).

## SUMMARY OF THE ARGUMENT

Potential hardship on the New Mexico municipalities which have filed an *Amici Curiae* brief and other New Mexico citizens residing in the Pecos River Basin in New Mexico, should not prohibit the Supreme Court of the United States from granting the relief recommended by the Special Master.

The interests of Texas and her citizens have been significantly affected by the actions of the State of New Mexico contrary to the Pecos River Compact, while New Mexico has been much better off because of the departures.

The relief recommended by the Special Master does not violate the Eleventh Amendment to the United States Constitution, since requiring New Mexico to repay water which was withheld from Texas contrary to the obligations imposed by the Pecos River Compact would not constitute an invasion of New Mexico's property in order to compensate individual citizens residing in Texas. The relief recommended by the Special Master would only require New Mexico to repay water that belongs to Texas by virtue of the Pecos River Compact and which New Mexico has kept from Texas.

The Pecos River Compact is a contract between the State of Texas and the State of New Mexico with the authority of federal law. The relief recommended by the Special Master is not inconsistent with the terms of the Pecos River Compact and is a proper remedy for New Mexico's breach of its obligations under the Pecos River Compact. To conclude otherwise would deprive Texas of the relief to which she is entitled.



## POINT I

Potential hardship to *Amici* should not prohibit the Supreme Court of the United States from granting the relief recommended by the Special Master, which compensates Texas for water withheld by New Mexico contrary to its obligations under the Pecos River Compact.

*Amici* have asserted that the Court should not order the relief recommended by the Special Master because of the potential hardship such relief might impose upon them. *Amici* relies upon the Court's opinion in *Colorado v. Kansas*, 320 U.S. 383 (1943), a non-compact, equitable apportionment case and one of a series of litigations involving the two states' respective rights in the Arkansas River. The Court had previously dismissed an Original Bill filed by Kansas seeking to restrain Colorado from diverting, or permitting anyone under her authority from diverting, waters of the Arkansas River within Colorado, because Kansas had failed to present sufficient evidence to the Court demonstrating that it was entitled to the relief it requested. *Colorado v. Kansas*, 206 U.S. 46, 117 (1907).

As noted by the Court in the latter suit: "In our former decision we ruled that Kansas was not entitled to a specific share of the waters as they flowed in a state of nature, that it did not appear that Colorado had appropriated more than her equitable share of the flow, and that if Kansas were later to be accorded relief, she must show additional takings working serious injuries to her substantial interests." *Colorado v. Kansas*, 320 U.S. 383, 391-392 (1943). It was obvious to the

Court in the first proceeding however, that if the depletion of the waters of the Arkansas River continued to increase there would come a time when Kansas could rightfully call for relief against the action of Colorado. 206 U.S. at 117-118.

In the later case, Kansas alleged that in the interim since the Court's prior decision, Colorado users had increased their appropriations and diversions, and threatened to further increase them, to the injury of the Kansas users. *Colorado v. Kansas*, 320 U.S. 383, 388 (1943). The Court again held however, that Kansas failed to sustain her burden of proof because she did not demonstrate that Colorado's use of the waters of the Arkansas River had materially increased, and that the increase worked a serious detriment to the substantial interests of Kansas. *Id.* at 400. In rejecting Kansas' claim that Colorado had substantially and injuriously aggravated conditions which had existed in Kansas at the time of the prior suit, this Court reaffirmed the standard of review it would apply in *equitable apportionment* cases:

The lower State is not entitled to have the stream flow as it would in nature regardless of need or use. If, then, the upper State is devoting the water to a beneficial use, the question to be decided, in the light of existing conditions in both States, is whether, and to what extent, her action injures the lower States and her citizens by depriving them of a like, or an equally valuable, beneficial use.

*Id.* at 393. In determining whether a state is using, or threatening to use, more than its equitable share of the benefits of a stream, "all the factors which create equities in favor of

one State or the other must be weighed . . . ." *Id.* at 394.

It is proper for the Court to consider, in equitable apportionment cases as the New Mexico *Amici* have stated, the injuries to existing uses and economic interests in all of the affected States. No relief, retroactive or prospective, was granted by the Court in *Colorado v. Kansas* because the evidence did not disclose that Kansas had significant interests which had been seriously affected by Colorado's use of the waters of the Arkansas River. *Id.* at 398-399. On the other hand, Colorado had a substantial investments in canals, reservoirs, and farms which had grown steadily due to irrigation. The Court noted that granting Kansas' requested relief would inflict serious damage on existing agricultural interests in Colorado and would operate to deprive some citizens of their means of support. *Id.* at 393.

The issues and facts presented to the Court in *Colorado v. Kansas* are distinguishable from the issues and facts that exist in the controversy between the State of Texas and the State of New Mexico that is now presented to the Court for resolution. As note by Mr. Justice Douglas, the Court's opinion in *Colorado v. Kansas*, is limited to the facts presented to the Court. See *Nebraska v. Wyoming*, 325 U.S. 589, 610-611 (1945). The differences extend beyond the mere fact that *Colorado v. Kansas* involved a non-compact, equitable apportionment and the present controversy involves a State's failure to deliver a specified amount of water which it had agreed to deliver pursuant to a binding compact with another State. Assuming that the application of a weighing test is

proper, the evidence discloses, and the Special Master recognized, that the lower basin State, Texas has suffered serious damage to an existing and bountiful agricultural community, whereas New Mexico's irrigation practices and agricultural economy have flourished because New Mexico "has had the advantage of more than its equitable share of water during the period 1950 to 1983." (Tx. Ex. 79; Tr. 397-399, 5/21/86; Special Master's Report at 42).

After the release of the Special Master's report which recommended requiring New Mexico to repay to Texas the water which it had failed to deliver pursuant to its compact obligations, New Mexico requested a hearing on the issue of New Mexico's ability to comply with that requirement and the economic hardship it would impose. At the hearing, New Mexico presented evidence on the economic loss that would be incurred if New Mexico were required to shut down pumpage in the Roswell basin of the Pecos River. The Special Master was not persuaded by this testimony and noted:

With regard to secondary impacts, I am quite skeptical of their validity, a skepticism that appeared to be shared to some extent by New Mexico's economic expert, Dr. Snyder, *see* Tr. 197-198 (5/20/86), as well as by Texas' economic expert, Mr. Wright, *see* Tr. 376-379 (5/20/86). . . . While New Mexico will undoubtedly suffer some economic loss from being required to deliver water to Texas, the amount is too speculative to quantify.

(Special Master's report at 34). Assuming that the Court is bound to consider potential hardship to New Mexico, then

apparent that New Mexico has failed to sustain her burden of proof in this regard.

The New Mexico *Amici's* assertion that their water rights will be cut off if the Court adopts the water payback remedy recommended by the Special Master was also rejected by the Special Master:

While it is clear that prior appropriation governs any *curtailment* of water rights by New Mexico to meet its Article III(a) and repayment obligation under the proposed relief, curtailment is not the only method of internal ordering open to New Mexico. As disclosed in the testimony of the New Mexico State Engineer on cross-examination, it is possible for New Mexico to purchase or condemn water rights and then (i) pump the water directly into the river in the case of ground water rights or (ii) curtail diversions in case of surface water rights. *See* Testimony of Stephen E. Reynolds, Tr. 56-60 (5/20/86). . . . Thus it is clear that New Mexico has other means of meeting a deliver obligations than curtailment of pumpage by junior rights holders in the Roswell Basin.

(Special Master's Report at 34-35). The Court is not asked, however, to provide a specific way for the shortages New Mexico has caused to be repaid. Rather, once the Court concludes the extent of the shortages, New Mexico has the flexibility to redress them in whatever way she should choose.



## POINT II

Granting the relief recommended by the Special Master would not violate the Eleventh Amendment.

Under the Eleventh Amendment to the United States Constitution, the Supreme Court of the United States is without jurisdiction to award damages to individual citizens of one State for injuries caused by another State. The New Mexico *Amici* relies upon this Court's decision in *North Dakota v. Minnesota*, 263 U.S. 365 (1923), in arguing that the Court is prohibited by the Eleventh Amendment from awarding damages to Texas for New Mexico's departure from its obligations imposed by the Pecos River Compact. The New Mexico *Amici's* reliance upon the Eleventh Amendment is misplaced. The New Mexico *Amici* cannot argue on the one hand as they have, that the waters of the Pecos River which originate in New Mexico "[are] the property of the State," while arguing on the other hand that the award of water damages to Texas is prohibited because Texas appropriators would benefit from the water. Such an argument ignores both the provisions of the Pecos River Compact and Texas law.

Texas law provides that the "water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the *property* of the state." TEX. WATER CODE ANN. § 11.021 (Vernon Pamph. Supp. 1987). The right to



use state water may be acquired by appropriation, after application to the Texas Water Commission. *Id.* §§ 11.022, 11.121. However, the fact that Texas may grant rights of use to its citizens does not diminish the fact that the water does not lose its character as state water when appropriated pursuant to rights granted under permits issued by the Texas Water Commission. *Texas Water Rights Commission v. Wright*, 464 S.W.2d 642, 647 (1971) (the right to use state water may be acquired by appropriation, but the State is at all times the owner of the corpus of the water subject only to the exhaustion of the corpus as a result of beneficial use). See TEX. WATER CODE ANN. § 11.025 (Vernon Pamph Supp. 1987) (a right to use state water under a permit or a certified filing is limited not only to the amount specifically appropriated but also to the amount which is being or can be beneficially used . . . ).

The Pecos River Compact also implicitly acknowledges the nature of Texas' interest in the waters of the Pecos River: "the provisions of the Pecos River Compact may not interfere with the right or power of either state to regulate within its boundaries the appropriation, use and control of water." Pecos River Compact, Article VIII.

If the Eleventh Amendment argument is accepted, the Court would eliminate or at least seriously hinder its power of equitable apportionment, because the Eleventh Amendment applies not only to the recovery of damages by citizens of one state from another state, but applies to "any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State . . . . U.S. CONST.

Amend. XI. If the Eleventh Amendment argument had been adopted by the Court in its equitable apportionment cases, there would never had been an instance where the Court would have been able to sustain its jurisdiction, because of the individual rights in the interstate water at issue. But as held by the Court in *Colorado v. New Mexico*, 459 U.S. 176, 182n.9 (1982), the Court is able to sustain its jurisdiction in spite of the Eleventh Amendment challenges, because of substantial interests of the state in its water resources:

Because the State of Colorado has a substantial interest in the outcome of this suit, New Mexico may not invoke its Eleventh Amendment immunity from federal actions by citizens of another State. The portion of the Vermejo River in Colorado is owned by the State in trust for its citizens. . . . While C.F. & I. will most likely be the primary user of any water diverted from the Vermejo River, other Colorado citizens may jointly use the water or purchase water rights in the future. In any event, Colorado surely has a sovereign interest in the beneficial effects of a diversion on the general prosperity of the State. Faced with a similar set of circumstances in *Kansas v. Colorado*, 206 U.S. 46, 99, 27 S.Ct. 655, 688, 51 L.Ed. 956 (1907), we concluded that "(t)he controversy rises . . . above a mere question of local private right and involves the matter of state interest and must be considered from that standpoint."

A state's interest in its water does not exist in a vacuum, but rather exists in main part due to the state's sovereignty over its natural resources and its interest in protecting the rights of its citizens. See, e.g., *Sporhase v. Nebraska*, 458 U.S. 941, 956-957 (1982). The compelling state interests which were recognized by the Court in *Colorado v. New Mexico* and *Kansas v. Colorado* in rejecting the Eleventh Amendment

argument, are just as valid in the present controversy and provide the basis for the Court's jurisdiction in ordering the implementation of the remedy recommended by the Special Master.

### POINT III

The Special Master's remedy of payback is a proper remedy for New Mexico's departure from the terms of the Pecos River Compact.

- A. The Pecos River Compact is a contract between the State of Texas and the State of New Mexico with the authority of federal law.

At the May 21, 1986 hearing on remedies, New Mexico asserted for the first time that the Pecos River Compact does not authorize relief for past diversions from the obligations created by the compact. Specifically, New Mexico argued, and the New Mexico *Amici* submits, that the common law of contracts does not apply to the obligations created under the compact, therefore the remedy of repayment is improper. The New Mexico *Amici* reject the Special Master's interpretation of the Court's opinion in *West Virginia ex. rel. Dyer v. Sims*, 341 U.S. 22 (1951), and appear to misinterpret Mr. Justice Brennan's statement in the Court's previous opinion in his proceeding (congressional consent transforms an interstate compact into a law of the United States). The New Mexico *Amici* imply that compacts are not contracts subject to contractual remedies, arguing that after Congressional consent, a compact becomes a federal statute.

Interstate compacts are created when two or more states enact essentially identical statutes that establish and define the compact and what it is to do. All contracts consist of an offer and acceptance. In the case of interstate compacts, both the offer and acceptance exist in the form of legislative acts. The New Mexico *Amici* do not question the fact that a contract is created when two or more states enter into a compact because the Court has conclusively resolved that issue. The New Mexico *Amici* however, views the consent of Congress to an interstate compact as a metamorphic act, which transforms a contract between two or more states into a federal law to be interpreted the same as federal statutes.

The Court has indeed often held, as stated by Mr. Justice Brennan, that "congressional consent transforms an interstate compact within this clause into a law of the United States." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983). However, the Court has expressly recognized the contractual nature of an interstate compact, and the fact that a congressionally approved compact has the effect of federal law for jurisdictional purposes does not change the compact's original contractual character:

If we attend to the definition of a contract, which is the agreement of two or more parties, to do or not to do certain acts, it must be obvious that the propositions offered, and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract. In fact, the terms compact and contract are synonymous . . . .

*Green v. Biddle*, 8 Wheat (21 U.S.) 1, 92 (1823). In acknowledging the Court's jurisdiction to determine controverted issues arising under an interstate compact, Chief

Justice Holmes later stated that the:

Court has the authority and duty to determine for itself all questions that pertain to the obligations of the contract alleged. The fact that the solution of these questions may involve the determination of the effect of the local legislation of either State, as well as of acts of Congress which are said to authorize the contract, in no way affects the duty of this Court to act as the final, constitutional arbiter in deciding the questions properly presented.

*Kentucky v. Indiana*, 281 U.S. 163, 176 (1930).

- B. The repayment remedy recommended by the Special Master is an appropriate remedy for New Mexico's departure from the Pecos River Compact and is a valid application of contract damages.

At the May 21, 1986 hearing on remedies, New Mexico also argued that the Pecos River Compact, by its express terms, does not contemplate an accumulation of debits and credits, or a repayment to Texas of accumulated negative departures from the 1947 condition. The New Mexico *Amici* insist that the remedy recommended by the Special Master may only be "inferred from the statute itself or its legislative history," and requests the Court to apply the four-part test for determining whether a remedy in favor of private parties other than the Federal government or public parties is implicit in a statute not expressly providing for a private remedy, which the Court established in *Cort v. Ash*, 422 U.S. 66 (1975). The New Mexico *Amici* argue that the remedy "must be found within the statute and cannot be brought in from without the statute because the Pecos River Compact is a federal law, and



not a contract.

The Court has not only determined that an interstate compact imposes a contractual obligation between the contracting States, *see Green v. Biddle* and *Kentucky v. Indiana, supra*, the Court has in fact recognized that contractual remedies may be granted for a State's breach of its compact. In *Virginia v. West Virginia*, 246 U.S. 565 (1917), the Court addressed its jurisdiction to enforce a contract made by the two states wherein West Virginia assumed a portion of Virginia's debt. In a prior suit Virginia invoked the jurisdiction of the Court to enforce the contract and judgment was issued for Virginia in the amount of \$12, 393,929.50 with interest. *Id.* at 589. The Court noted that the judgment was based on three propositions, one of which was the fact that the "obligation of West Virginia was the subject of a contract between the two States, made with the consent of Congress . . . ." *Id.* The Court then addressed the "question of power to enforce against a State when admitted into the Union a contract entered into by it with another State with the consent of Congress . . ." *Id.* at 593.

Chief Justice White stated on behalf of the Court that a power exists to enforce against a State its duty under its contract with another State and to prevent it from doing wrong to that State. If no such power existed, the Chief Justice wrote, "the government under the Constitution would not be an indissoluble union of indestructible States each having the potency with impunity to wrong or degrade another -- a result which would inevitably lead to a destruction of the union



between them." *Id.* at 602. The Court must have jurisdiction to compel a State's obedience to the duties it assumes by entering into an interstate compact. In fact, in its previous opinion in this proceeding, the Court acknowledged its jurisdiction to compel New Mexico's compliance with the Pecos River Compact when it stated: "Texas' right to invoke the original jurisdiction of this Court was an important part of the context in which the Compact was framed; indeed, the threat of such litigation undoubtedly contributed to New Mexico's willingness to enter into a compact." *Texas v. New Mexico*, 462 U.S. 554, 569 (1983).

Mr. Justice Brennan also stated that in the absence of an expression provision or other clear indication that a bargain to that effect was made, the Court "shall not construe a compact to preclude a State from seeking judicial relief when the compact does not provide an equivalent method of vindicating the State's rights." *Id.* at 569-570. If Texas' only remedy under the Pecos River Compact was to obtain a judicial determination that New Mexico had violated the terms of the compact by failing to deliver the quantity of water it had agreed to, and New Mexico was only instructed to deliver that amount in the future, New Mexico's obligations would be illusory. The Court has previously concluded however, that "It is difficult to perceive that Texas would trade away its right to seek an equitable apportionment of the river in return for a promise that New Mexico could, for all practical purpose, avoid at will." *Id.* at 569.

## CONCLUSION

The Special Master has recommended a remedy which is consistent with the Eleventh Amendment to the United States Constitution. Although application of a "weighing of interests test" may not be proper in this proceeding, New Mexico has failed to sustain its burden to show that imposition of the repayment would result in hardship to the New Mexico *Amici* and other New Mexico citizens such that would render the granting of the remedy recommended by the Special Master inappropriate. Potential economic hardship a factor which the Court Considers in an equitable apportionment, is not a defense in a proceeding involving a state's failure to deliver water pursuant to an interstate compact.

The Pecos River Compact is a contract between the State of Texas and the State of New Mexico and the Court has jurisdiction to impose the remedy recommended by the Special Master for a breach of that contract. *Amicus Curiae*, Red Bluff Water Power Control District requests the Court to approve the repayment remedy recommended by the Special Master.

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STATE OF TEXAS,  
*Plaintiff,*

v.

STATE OF NEW MEXICO,  
*Defendant,*

UNITED STATES OF AMERICA,  
*Intervenor.*

**NEW MEXICO'S ANSWER BRIEF  
IN RESPONSE TO TEXAS'  
BRIEF IN SUPPORT OF EXCEPTION**

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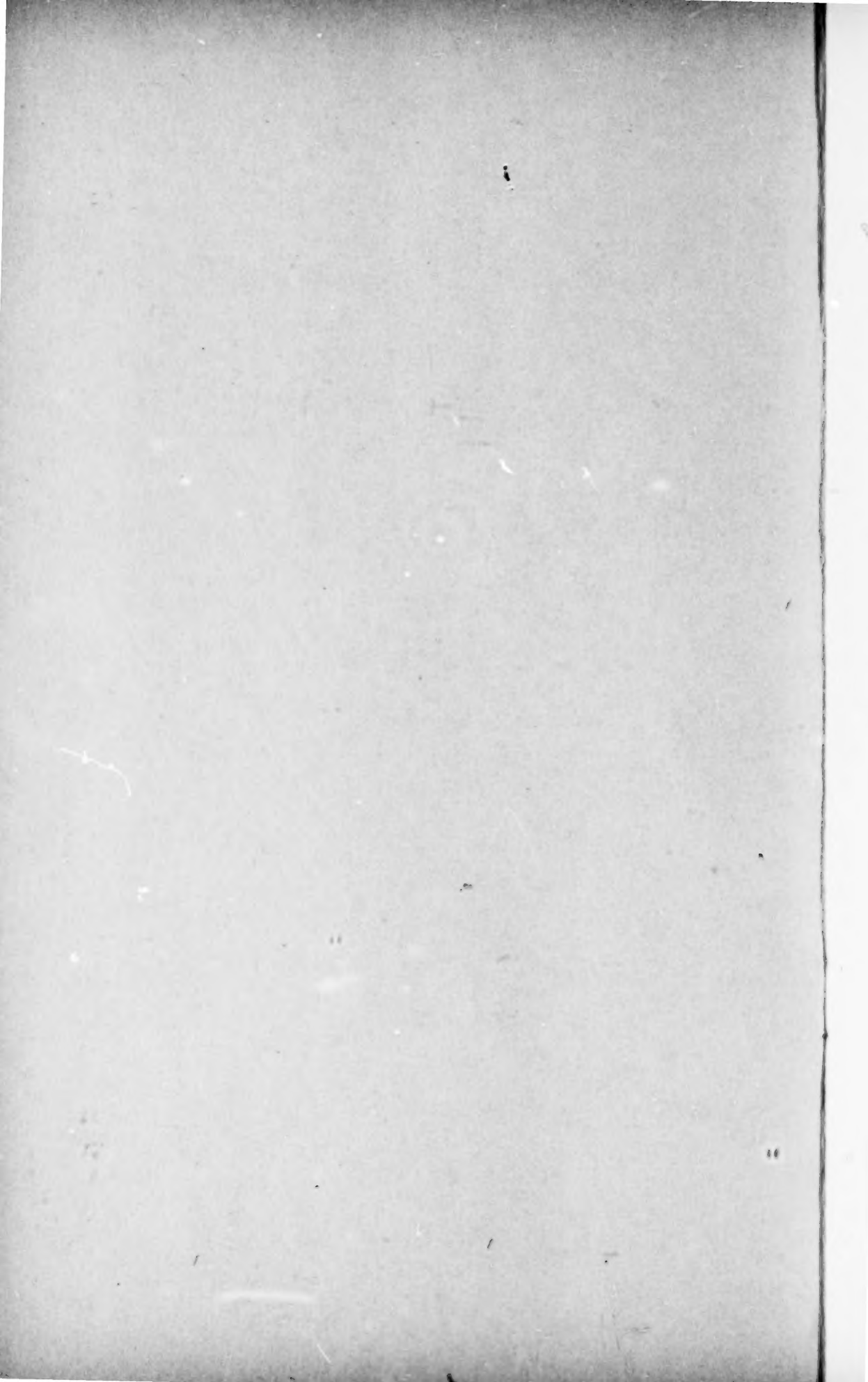
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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
ARGUMENT.....	1
THE MASTER PROPERLY SUPPORTED THE PECOS RIVER COMMISSION'S DECISION NOT TO CHARGE NEW MEXICO WITH NEGATIVE DEPARTURES RESULTING FROM THE TRAINING DIKE AT McMILLAN RESERVOIR. . . .	1
A. The Pecos River Commission properly took account of reduced leakage from McMillan Reservoir. ....	2
B. There is no evidence of any "deal" that the McMillan dike solution was limited to the 1950-61 period .....	4
C. The Commission's actions on delivery obligations are dispositive .....	6
NEW MEXICO'S RESPONSE TO TEXAS' OBJECTIONS TO PROPOSED DECREE .....	8

## TABLE OF AUTHORITIES

CASES:	Page
<i>Texas v. New Mexico</i> , No. 65, Original	
462 U.S. 554 (1983) . . . . .	7
Special Master Report – July 29, 1986 . . . . .	2, 3, 4, 6, 8, 9
<i>Colorado v. Kansas</i> , 320 U.S. 383 (1943) . . . . .	7
<i>Utah v. United States</i> , 394 U.S. 89 (1969) . . . . .	7
<b>EXHIBITS:</b>	
Stip. Exhibit 2, Engineering Advisory Committee Minutes November 8, 1962. . . . .	5
Stip. Exhibit 4(b), Pecos River Commission Minutes May 17, 1951 . . . . .	2
January 31, 1961 . . . . .	3
November 9, 1962. . . . .	4
Stip. Exhibit 7, Pecos River Commission Transcript November 9, 1962. . . . .	5
Texas Exhibit 68. . . . .	6
Texas Exhibit 79. . . . .	8



No. 65, Original

IN THE  
**Supreme Court of the United States**

October Term, 1986

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STATE OF TEXAS,  
*Plaintiff,*

v.

STATE OF NEW MEXICO,  
*Defendant,*

UNITED STATES OF AMERICA,  
*Intervenor.*

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**NEW MEXICO'S ANSWER BRIEF  
IN RESPONSE TO TEXAS'  
BRIEF IN SUPPORT OF EXCEPTION**

---

**ARGUMENT**

**THE MASTER PROPERLY SUPPORTED  
THE PECOS RIVER COMMISSION'S DECISION  
NOT TO CHARGE NEW MEXICO WITH  
NEGATIVE DEPARTURES RESULTING FROM  
THE TRAINING DIKE AT McMILLAN RESERVOIR**

The Master's finding that the 27,600 acre-feet of depletions at the state line from 1962 through 1983 which resulted from the increased irrigation supply made available in New Mexico by the McMillan training dike should be deducted from the negative departures in stateline flow, is correct for three reasons. First, the Pecos River Commission's decision regarding increased depletions due to McMillan dike was part of the

Commission's continuing effort to formulate a proper description of the 1947 condition. Second, there is no evidence to suggest that the Commission's actions constituted a limited "deal" acquiesced in by Texas, for only the period 1950-61. Third, the Commission's decision was within the scope of its congressionally ratified powers and, as such, should not be reviewed.

It should be noted that while New Mexico supports the Master's finding that the 27,600 acre-feet should be deducted from the negative departures at the state line, she maintains her objection to any accumulation of debits or credits under the Compact. Findings regarding past depletions are useful only to the extent that they help to identify a trend and the site of the depletion to enable a determination of the cause.

**A. The Pecos River Commission properly took account of reduced leakage from McMillan Reservoir.**

The Master's 1986 Report discusses the pertinent Commission meetings and the Joint Memorandum in detail; the events will not be repeated here except in pertinent part. 1986 Report at 11-17.

McMillan Dam was constructed in 1893. Unprecedented floods in 1941 and 1942 significantly increased leakage from the reservoir which, in part, was reflected as increased flow at the state line. In 1951 the Commission recommended that McMillan Reservoir be rehabilitated to reduce leakage from the reservoir in order to improve the use of Pecos River water. Stip. Exhibit 4(b) at 43 (Commission minutes of May 17, 1951). Accordingly, in 1954 a dike was constructed as a cooperative project of the State of New Mexico, the U.S. Bureau of Reclamation, and the Carlsbad Irrigation District. The dike was built along the eastern shoreline where extensive caverns had been created as a result of the 1941 and 1942 floods.

The dike reduced leakage, and the flow at the state line was decreased. In 1961 and again in 1962, the Commission decided how to treat the problem of the decreased stateline flows.

Texas characterizes this issue as one of determining whether depletions due to McMillan dike were caused by man's activities. In this simplistic view, any depletions due to the dike must necessarily be charged to New Mexico under the Compact definition of man's activities. Texas misses the point. As the Commission and the Master recognized, the problem is instead a matter of deciding which leakage condition should be used in defining the 1947 condition. Stip. Exhibit 4(b) at 238 (Commission minutes of January 31, 1961); 1986 Report at 11, 14. The dike merely restored the efficiency of McMillan Reservoir to that which was present during essentially all of the 1905-46 period used to define the 1947 condition, but materially reduced by the 1941 and 1942 floods. The Commission, acting within the scope of its congressionally ratified powers, decided that it was not the intent of the Compact to allow the disastrous floods to distort the definition of the 1947 condition upon which the Compact is based.

In response to the Commissioners' recommendation in their August 23, 1960 Joint Memorandum, the inflow-outflow subcommittee completed two routing studies, one which accounted for the effect of the training dike in determining the 1947 condition, and one which did not. Stip. Exhibit 4(b) at 241, 242, *supra*. The Commission adopted both studies and compared them in order to determine the amount of the increased depletions attributable to the dike. *Id.* at 245.

The Commission's decision to effectively redefine the 1947 condition to include the reduced leakage caused by the McMillan dike was legally sound under the circumstances. Even if, as the Master states, the Compact contained a latent ambiguity with respect to the depletions due to the training dike, that

ambiguity was resolved by the Commissioners' agreement. As the agency entrusted to administer the Compact, its interpretation of the Compact is entitled to substantial deference. 1986 Report at 18. Texas has failed to show how any of the Commission's actions were legally unsound to the extent that this Court should now step in and review them.

**B. There is no evidence of any "deal" that the McMillan dike solution was limited to the 1950-61 period.**

Texas claims that the Commission's decision not to charge New Mexico for the depletions due to McMillan dike stemmed from an accommodation or limited "deal" between Texas and New Mexico and was not intended to become a "permanent legal interpretation of the Compact." Exception of the State of Texas to Report of the Special Master and Brief in Support (Texas Brief) at 8, 11 (December 18, 1986). This claim is without foundation and results from a strained and incorrect reading of the record.

As the Master's Report states, the Commission discussed McMillan dike for the second time on November 9, 1962. 1986 Report at 14-17. At that meeting, Exhibit 1, which set forth inflow-outflow and departure data for the 1950-61 period, was circulated. Exhibit 1 is reproduced in the 1986 Report at 16. The minutes relate that the engineering advisory committee amended the exhibit by deleting the "second paragraph" and inserting as the last sentence of the first paragraph the sentence "Otherwise the above findings are arrived at in the same manner as described in the January 1961 report of the Engineering Advisory Committee." The Commission adopted the exhibit, as amended. Stip. Exhibit 4(b) at 258 (Commission minutes of November 9, 1962).

Exhibit 1 contained two tables of inflow-outflow calculations prepared by the engineering advisors. The first table listed the stateline departures of stream flows from the 1947

condition. The second table listed the departures resulting from McMillan dike. There are three unnumbered paragraphs between the two tables. The first paragraph is a footnote explaining changes in the table of stateline departures. The second paragraph states that the table of stateline departures does not reflect adjustments for certain groundwater depletions below Carlsbad. The third paragraph explains the second table, which lists departures resulting from McMillan dike.

Both Texas and the Master reason that because the first paragraph is a starred footnote, the deleted paragraph referred to in the minutes is actually the paragraph relating to the McMillan dike departures rather than the paragraph relating to depletions below Carlsbad. Texas uses this interpretation to bolster its contention that the Commission reversed its previous position that New Mexico not be charged for McMillan dike departures. Texas Brief at 11.

The record distinctly shows otherwise. At the November 8, 1962, meeting of the engineering advisory committee, it considered adjustments in stateline departures for McMillan dike and prepared an explanatory paragraph on the adjustments. The committee did not consider adjustments for depletions caused by groundwater pumping below Carlsbad. Stip. Exhibit 2 at 3 (Committee minutes of November 8, 1962). The next day, the engineering advisor for Texas requested the deletion of the second paragraph of Exhibit 1 because it "covers a matter not discussed" at the engineering advisory committee meeting on the previous day. Stip. Exhibit 7 at 62 (Transcript of November 9, 1962 Commission meeting). Thus, it is clear that the Texas advisor requested the engineering committee to delete the paragraph on adjustments for groundwater depletions below Carlsbad.

Further, the first and starred paragraph deals with findings submitted by the engineering advisory committee to the Commission in January 1961 and minor changes from certain values. The sentence to be added to the end of the "first paragraph"

likewise refers to the engineering advisory committee's submission to the Commission, and distinguishes the deviations made from the values listed in the 1961 engineering report from the findings made in accordance with that report.

It is inconceivable that the Commission would reverse itself on a matter of this importance without any further discussion or statement of intention. Regardless of which paragraph of Exhibit 1 the Commission intended to delete, the Master correctly analyzes the Commission's purpose. Neither deletion would manifest an intention to reverse the principle of not charging New Mexico for depletions resulting from the McMillan dike. 1986 Report at 17.

Texas has failed to produce any substantive evidence to show that she merely acquiesced in any sort of limited deal with New Mexico or that the Commission limited its interpretation of the appropriate treatment of McMillan dike leakage to past, not future, departures.<sup>1</sup> On the contrary, the administrative history of the Compact illustrates that the Commission has conclusively resolved the matter within the proper scope of its authority.

**C. The Commission's actions on delivery obligations are dispositive.**

The Master recognized that the Commission's agreement to exclude McMillan dike leakage from the 1947 condition is

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<sup>1</sup> In its definition of the 1947 condition, Texas Exhibit 68, which the Master's proposed decree would require to be used, incorporates the McMillan Reservoir leakage condition as it existed in the period 1946-52, that is, after the 1941 and 1942 floods and before the construction of the dike. This, of course, makes it necessary to adjust stateline flows in the future, as the Master has done for the 1962-83 period, to implement the Commission's action effectively redefining the 1947 condition by a proper accounting of the McMillan Reservoir leakage.



dispositive of this issue. In 1983 the Court concluded that it was not the "proper function" of its original jurisdiction to review decisions actually made by the Pecos River Commission. *Texas v. New Mexico*, 462 U.S. 554, 570 (1983). The Court reasoned that:

If authorized representatives of the compacting States have reached an agreement within the scope of their congressionally ratified powers, recourse to this Court when one State has *second thoughts* is hardly 'necessary for the State's protection' . . . Absent *extraordinary cause*, we shall not review the Pecos River Commission's actions without a more precise mandate from Congress than either the Compact or 28 U.S.C. § 1251 provides.

*Id.* at 570-71 (footnote and citation omitted, emphasis added).

Clearly, the Court prefers mutual accommodation and agreement for the settlement of interstate disputes. *Id.* at 575; *Colorado v. Kansas*, 320 U.S. 383, 392 (1943). An unrestricted review of the actions of interstate compact commissions undercuts this means of resolving disputes. By imposing the burden of showing "extraordinary cause" upon the state that has "second thoughts," the Court strengthens this means of conflict resolution. This "second thoughts" rule is in accord with the policy of the Court that "original jurisdiction should be invoked sparingly." *Utah v. United States*, 394 U.S. 89, 95 (1969). Because Texas has failed to show "extraordinary cause," the Court should not review the Commission's decision to effectively redefine the 1947 condition with a proper accounting of the effects of the McMillan dike.

New Mexico urges the Court to overrule Texas' exception on the above-stated grounds.

## NEW MEXICO'S RESPONSE TO TEXAS' OBJECTIONS TO PROPOSED DECREE

Texas requests certain changes in the Master's proposed decree. That both New Mexico and Texas have serious problems with the decree and have differing interpretations of the Master's intent, substantiates New Mexico's claim that the proposed decree is ambiguous, confusing, and unworkable.

1. Texas' requested change in Article II(B) of the proposed decree would require the Pecos River Commission to use in future administration all the hydrologic procedures in Texas Exhibit 79, regardless of any change in the condition of the Pecos River after 1983. Article II(B), with or without Texas' proposed revision, would in effect amend Article VI(c) of the Compact by prohibiting the Commission from changing the description of the river in order to correctly compute future index inflows or from adopting a more feasible method of river accounting.

2. There is an obvious error in the last line in Article IV in the Master's proposed decree. 1986 Report at A-2; New Mexico's Exceptions to the Report of the Special Master and Brief in Support of Exceptions at A-4 (December 19, 1986); Texas Brief at 6. Article IV requires water interest "on the balance of the amount New Mexico owes to Texas under Section II(B) of this Decree." Article II(B), or Section II(B)," of the proposed decree relates only to the index inflow component of the inflow-outflow equation and not to any obligation of New Mexico. Some inadvertence must be presumed. Texas requests that the reference to II(B) be changed to II(C), which sets forth the amount of past-due water New Mexico owes to Texas.

3. The Master's intent regarding the payment of water interest is unclear from the 1986 Report, and is correspondingly

unclear in Article IV of the proposed decree. Texas requests that water interest be charged in the last five years of the 10-year payment period in the proposed decree, arguing that the Master did not intend that the proposed decree would limit water interest to just the first five years of the 10-year payment period. *Id.* at 6-7.

Texas relies on two inconsistent statements in the Master's Report in support of its position. First, the Master indicates that water interest will be due only if New Mexico fails to act in good faith, and defines good faith as

meeting at least 80% of the aggregate minimum delivery requirement for the first five years, and the annual minimum delivery obligation each year thereafter.

*Id.* at 7, quoting, 1986 Report at 37.

Then, the Master indicates that 80 percent of the annual minimum delivery obligation could be met each and every year for New Mexico to demonstrate good faith:

if New Mexico meets 80% of its obligation during the first five years *and each year thereafter* a rebuttable presumption should exist that she acted in good faith.

*Id.*, quoting, 1986 Report at 37 n.16 (emphasis added).

It is not clear under which scheme the Master intends that water interest be imposed on New Mexico. On the basis of the latter statement quoted above, New Mexico would have 10 years after the grace period to liquidate without interest 80 percent of the debit found by the Master and an indefinite period thereafter to liquidate without interest the remaining 20 percent of the debit.

Assuming (1) that the last line in Article IV is corrected as suggested by Texas by substituting II(C) for II(B) and (2)

that New Mexico did not meet at least 80 percent of the aggregate annual minimum delivery requirement at the end of the first five years of the 10-year payment period, it appears that under the proposed decree New Mexico would be charged with interest not only on all amounts undelivered during the first five-year period but also on the balance of the amount New Mexico owes to Texas during the last five years under the decree, regardless of whether the annual minimum delivery obligation was met in each of those years. On the other hand, if New Mexico delivers 80 percent of the aggregate annual minimum delivery requirement during the first five years, the Master's proposed decree would require no interest even if the annual minimum delivery requirement is not met in any subsequent year. The degree of confusion engendered by the proposed decree compels the conclusion that it is imprudent and unworkable.

No consideration of any of the foregoing is needed if the Court correctly finds that there is no provision for the payment of accrued debits under the Compact.

Respectfully submitted,

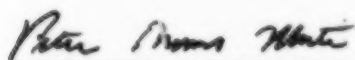
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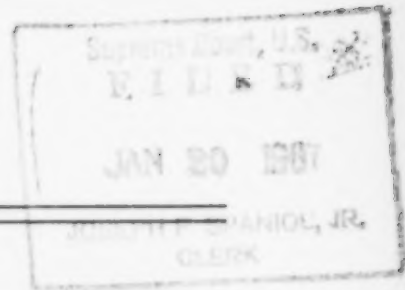


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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

STATE OF TEXAS,

*Plaintiff,*

vs.

STATE OF NEW MEXICO,

*Defendant.*

**Texas' Reply to New Mexico's Exceptions**

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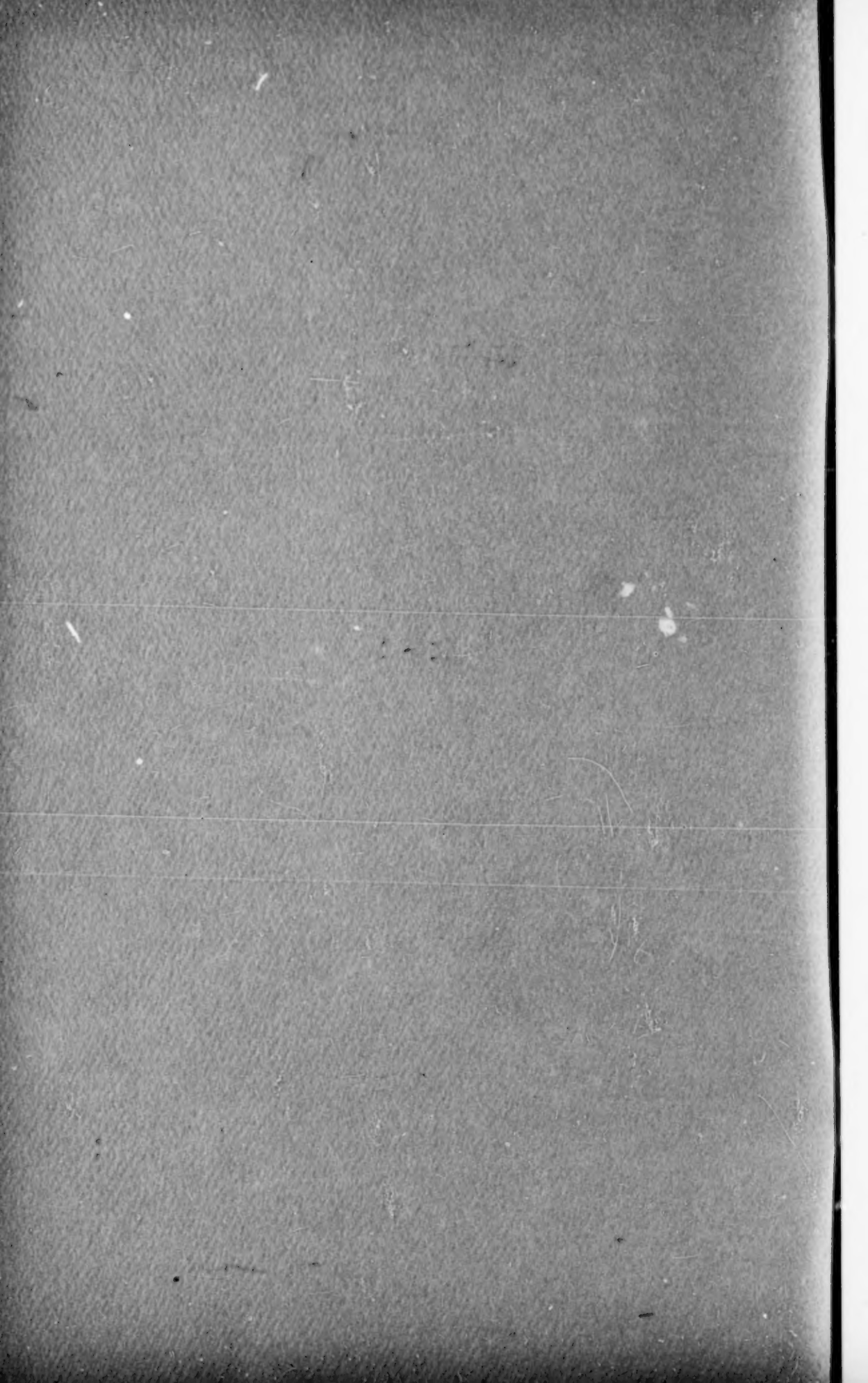
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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
SUMMARY OF ARGUMENT .....	3
ARGUMENT:	
I. In the final evidentiary hearing before the Special Master, Texas proved the extent to which state line departures were due to man's activities, and New Mexico offered no rebuttal .....	5
II. The Compact and the Court's prior decisions in this case establish that New Mexico must repay the water it illegally withheld from Texas for the 1950-1983 period .....	10
III. The Special Master's recommended relief, including the provisions that New Mexico's water debt be repaid in thirteen years, that it be repaid in water, and that water interest be imposed if New Mexico acts in bad faith, is proper and based on a consideration of all relevant factors ..	17
CONCLUSION .....	23
APPENDIX A (October 10, 1985 Pretrial Order) .....	A-1
APPENDIX B (Reponse to New Mexico's Objections to Proposed Decree) .....	B-1

# TABLE OF AUTHORITIES

Cases:	Page
<i>Bell v. Hood</i> , 327 U.S. 678 (1946) .....	14
<i>Cannon v. University of Chicago</i> , 441 U.S. 677 (1979) .....	17
<i>Colorado v. Kansas</i> , 320 U.S. 383 (1943) .....	15
<i>Colorado v. New Mexico</i> , 459 U.S. 176 (1982) .....	17,19,20
<i>Kentucky v. Indiana</i> , 281 U.S. 163 (1930) .....	14,15,22
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803) .....	14
<i>Middlesex County Sewerage Authority v. National Sea Clammers Association</i> , 453 U.S. 1 (1981) .....	17
<i>New Jersey v. New York</i> , 283 U.S. 336 (1931) .....	23
<i>Pennhurst State School and Hospital v. Halderman</i> , 451 U.S. 1 (1981) .....	17
<i>Rodgers v. United States</i> , 332 U.S. 371 (1947) .....	5,21,22
<i>Texas v. New Mexico</i> , 468 U.S. 1202 (1984) .....	2
<i>Texas v. New Mexico</i> , 467 U.S. 1238 (1984) .....	1,B-1,B-2
<i>Texas v. New Mexico</i> , 462 U.S. 554 (1983) .....	2,10,15,16,22,B-1
<i>Texas v. New Mexico</i> , 446 U.S. 540 (1980) .....	16
<i>Virginia v. West Virginia</i> , 246 U.S. 565 (1918) .....	14
<i>Ward v. Love County</i> , 253 U.S. 17 (1920) .....	14
<i>West Virginia ex rel. Dyer v. Sims</i> , 341 U.S. 22 (1951) .....	14
<i>Wyoming v. Colorado</i> , 309 U.S. 572 (1940) .....	16
Constitution and Statutes:	
U.S. Const. amend. 11 .....	17
Pecos River Compact, 63 Stat. 159 (1949) .....	<i>passim</i>

Cases:	Page
Rio Grande Compact, 53 Stat. 785 (1939) .....	13
TEXAS WATER CODE ANN. § 11.021 (Vernon Supp. 1987)	17



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

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STATE OF TEXAS,

*Plaintiff,*

vs.

STATE OF NEW MEXICO,

*Defendant.*

---

**Texas' Reply to New Mexico's Exceptions**

Texas submits this reply to New Mexico's exceptions to the Special Master's Report. Citations to transcribed proceedings before him will be to the transcript page, followed by the date of the proceeding.

**STATEMENT OF THE CASE**

New Mexico lays little emphasis on the technical issues of fact which consumed the overwhelming bulk of the energies of the parties, the Special Master, and his technical consultant. Instead, the cast of its exceptions is predominantly toward the order and manner of proceedings before the Special Master. Therefore, the following map of the proceedings is provided to aid the Court in threading its way through the issues presented by New Mexico's exceptions.

On June 11, 1984, the Court summarily approved the 1984 Report of the Special Master, thereby establishing the formula for determining the quantity of water Texas would have received under the 1947 condition of the Pecos River each year of the 1950-1983 period. *Texas v. New Mexico*, 467 U.S. 1238 (1984). The decision left two basic issues for resolution in this case: the amount of shortfall in the annual river deliveries to Texas for the 1950-1983 period; and the extent to which the shortfalls were due to man's activities in New Mexico.



Shortly after the 1984 decision, the Court accepted the resignation of the previous Special Master and appointed his replacement, Mr. Charles J. Meyers. 468 U.S. 1202 (1984). Since his mid-1984 appointment, the new Special Master has stressed to the litigants his intention to complete work on the two remaining basic issues and forward his final recommendations to the Court so that it may render the "final decision" foreseen at the time of the 1983 remand of the case, *Texas v. New Mexico*, 462 U.S. 554, 556 (1983). See, e.g., May 22, 1985 Order, para. 7 (ordering counsel to prepare for November, 1985 trial on the merits); June 26, 1985 Letter to Counsel (setting trial dates). The parties lodged no objections to the plan and, accordingly, moved along the litigation course marked by the Special Master.

Under the Special Master's direction, documents were exchanged, and telephone conference calls and meetings were conducted. Then, on October 10, 1985, the Special Master entered a Pretrial Order governing the conduct of the trial on the merits which was to commence on November 18, 1985. The relevant portions of the October 10, 1985 Pretrial Order are reproduced in Appendix A to this reply.

The trial commenced as planned on November 18, 1985, and continued on November 19th, December 3rd, and December 4th. At the conclusion of the December 4th hearing, repeating his earlier admonitions, see, e.g., May 22, 1985 Order, para. 7, the Special Master reiterated that the late 1985 hearings were to be the last evidentiary hearings. Tr. 370-71 (12/4/85). See also Tr. 313-14 (Tr. 12/4/85).

In March, 1986, the Special Master issued a draft report, and in a transcribed proceeding on April 16th, heard oral argument on it. Two days later, he acceded to a request from New Mexico and set a hearing, which was to be limited to evidence on the amount of acreage in New Mexico that would be taken out of cultivation at four alternative rates of repayment of the water debt and the economic consequences of such reduced cultivation. April 18, 1986 Order. The hearing occurred on May 20th and 21st, with limited evidence also taken on the meaning of a Texas exhibit that had been introduced at the December 3rd hearing.

In late July, 1986, the Special Master forwarded his final Report to the Court, where it was ordered filed on October 6, 1986. In the Report, the Special Master makes recommendations for the resolution of all the remaining issues in the case. These recommendations, in summary, are that New Mexico have to pay back to Texas 340,100 acre-feet of water over a thirteen year period (consisting of a contingent three year grace period, followed by ten years for repayment) and that New Mexico be placed under an injunction that will result in its having to fulfill its future delivery obligations under the Pecos River Compact ("Compact"). New Mexico has filed exceptions to the 1986 Report, and Texas now replies to those exceptions. New Mexico also listed its objections to the Special Master's Proposed Decree in an appendix. New Mexico's Exceptions, Appendix A. Texas' response to the objections is in Appendix B to this reply.

### SUMMARY OF ARGUMENT

New Mexico has elevated its belatedly-raised afterthoughts in this case to the only issues it is raising. Each of its three exceptions should be overruled.

In its first exception, New Mexico argues that the Special Master failed to conduct an evidentiary hearing on the extent to which man's activities in New Mexico caused negative departures from the 1947 condition. To put it bluntly, the argument is groundless and flatly contradicted by the record. The record demonstrates that New Mexico has fundamentally mischaracterized the course of proceedings before the Special Master. For at least a half year, New Mexico was formally on notice that a final hearing was to be conducted in this case and that man's activities was to be litigated in that hearing. Every factual issue listed by New Mexico in the governing pretrial order was litigated and decided. New Mexico registered no objection to the subject matter litigated at the final hearing and was repeatedly informed that the hearing was the last one. Texas introduced persuasive evidence establishing the extent to which negative departures were due to man's activities in New Mexico. New Mexico offered no evidence. It was only well after the conclusion of the final hearing and after the Special Master had issued a draft report finding Texas' evidence

persuasive, that New Mexico objected to the proceedings. Its objection is nothing more than a bold, but baseless, effort to obtain a second chance to litigate an issue that it already has lost. The fact that it has lost the issue is not a ground for its being allowed to try it again.

In its second exception, New Mexico argues that, under the Pecos River Compact, it does not have to repay Texas 340,100 acre-feet of water it failed to deliver in accordance with Article III(a) of the Compact. For thirteen years, this litigation has been directed toward a determination of the amount of water New Mexico owes Texas. The Court's 1983 decision left that determination as the only remaining issue and constitutes the law of the case. There is no reason to reexamine the decision. Even if there were, the Compact's language and structure and the history of its development establish that New Mexico's Article III(a) water delivery obligation to Texas is a firm one that is to be performed annually. Through the Compact, Texas has a contractual right to the water, and New Mexico has a contractual obligation to deliver it. The Court has the power to order compliance with the Compact, including the power to order repayment when the Compact's delivery requirements are violated. The Court's acceptance of New Mexico's argument that it may violate its Compact obligations and not be held legally accountable would constitute a grave injustice to Texas, which entered into the Compact instead of seeking an equitable apportionment of the Pecos River, and would discourage other states from resolving their disputes through compacts. The Court has been unstinting in ordering non-compliant states to abide by their contractual obligations, and there is no reason New Mexico should be excused from abiding by the Court's long-established principles.

In its third exception, New Mexico argues against three specific aspects of the relief recommended by the Special Master. It disagrees with the recommended period for repayment of its debt to Texas, but it offers the Court neither a standard for determining what the period should be nor its own view of the appropriate period. Assuming the Court decides this case in 1987, New Mexico's water debt to Texas would be finally repaid seventeen years after the last violation adjudicated thus far in the case and a half century after the first violation. By

any applicable standard, this payback period is fair. Its fairness is enhanced because, if New Mexico complies with the decree in good faith, it will not have to pay any interest on its debt. New Mexico also disputes the Court's authority to order that interest be paid on the debt New Mexico has accrued due to its Compact violations. The interest will not be imposed at all unless New Mexico acts in bad faith. Even if New Mexico acts in bad faith, it does not begin to run until 1995, eight years into the payback period. Even if full interest payments had been ordered, the principles established in *Rodgers v. United States*, 332 U.S. 371 (1947), would validate the requirement. It necessarily follows that a less onerous interest requirement is valid. Finally, New Mexico asks the Court for permission to repay its debt in money instead of water. New Mexico did not present this argument to the Special Master as an issue. It offers no authority in support of its argument. The reason for its request for a money alternative is clear. The Court's granting of it would necessitate a remand to the Special Master for further evidentiary hearings on the fair market value of the past-due water, thereby further postponing New Mexico's day of reckoning under the Compact. No further delay should be countenanced. New Mexico should be ordered to begin complying with the Compact and to begin the repayment of the water it has illegally withheld from Texas.

## ARGUMENT

### I.

**In the final evidentiary hearing before the Special Master, Texas proved the extent to which state line departures were due to man's activities, and New Mexico offered no rebuttal.**

In setting the stage for its first exception—that “the master refused to hold an evidentiary hearing on the extent to which departures were due to man's activities in New Mexico,” New Mexico's Exceptions, at i & 14—New Mexico has fundamentally mischaracterized the course of proceedings before the Special Master. The problem is not that the Special Master refused to hold a hearing on the effects of man's activities on New Mexico's departures from its Article III(a) delivery obliga-



tions. He did hold such a hearing. The problem, instead, is that, when given the opportunity, New Mexico offered no evidence at all to rebut Texas' proof on the issue. The fault, as the record demonstrates, lies with New Mexico, not the Special Master.

After the Court's 1984 decision and appointment of the new Special Master, New Mexico, as well as Texas, had nearly a year and a half to prepare for the final trial on the merits which commenced in November, 1985. In an order entered in May of 1985, the Special Master forewarned the parties that they "should prepare for a trial on the merits in November, 1985 of the issue of depletions caused by man's activities." May 22, 1985 Order, para. 7. Neither state objected. That New Mexico understood and accepted the import of the May 22nd admonition is clear from a statement of its counsel at the commencement of the evidentiary hearing on November 19, 1985. He acknowledged that the Special Master's May 1985 directive contemplated that the November trial would be "on all remaining issues of fact . . ." Tr. 28 (11/19/86).

The October 10, 1985 Pretrial Order provided the parties the opportunity and duty to list "all remaining issues of fact," as well as of law, to be resolved through the November trial. New Mexico's statement of the remaining disputed issues of fact on the "causes of depletions" are listed in Part II.B.4(a)-(c) of the Pretrial Order, p. A-3, *infra*. The only three listed factual disputes over the causes of depletions concern what came to be known as the Upper Reach issue, the McMillan dike issue, and the Capitan Aquifer issue. New Mexico lists no other disputed causes of depletion.

As the evidentiary proceedings drew to a close, the Special Master urged the parties to work toward an amicable settlement of "these three issues that are outstanding," listing the same three issues New Mexico had listed in the Pretrial Order. Tr. 319-20 (12/4/85). No settlement was reached, and the Special Master has made recommendations on the resolution of each of the three issues—the Upper Reach, 1986 Report 22-26; the McMillan dike, 1986 Report 11-22; and the Capitan Aquifer, 1986 Report 26-30. New Mexico has accepted all three recommendations. New Mexico Exceptions 6.

The picture revealed by a review of proceedings before the Special Master is radically different than the one painted by New Mexico. The Special Master gave New Mexico ample opportunity to raise the factual issues it thought appropriate for trial, even to the point of granting it special indulgence, because of its quasi-sovereign status, to litigate the Capitan Aquifer matter—a tardily raised, technically complex issue of potentially enormous significance.<sup>1</sup>

Yet, on the factual issue which it now characterizes as “critical,” *see* New Mexico’s Exceptions 12, New Mexico chose repose. When Texas offered into evidence the document which accounted for all causes of departures other than human ones, New Mexico stipulated to it. Tr. 11-12 (11/18/85) (admission into evidence of Tex. Exh. 73; agreement to subsequent modification); Tr. 103 (12/3/85) (admission into evidence of Tex. Exh. 79, modifying Tex. Exh. 73). New Mexico offered no subsequent testimony or other evidence to rebut Tex. Exh. 79.

The basis for New Mexico’s approach on this issue is unknown and undisclosed. The possible explanations run the speculative gamut from an absence of technically supportive evidence, through subtle, but misdirected, trial strategy, to outright oversight. Whatever the reasons, the fact remains that Texas came forward with evidence which answered the “two subsidiary questions” posed by the Court in its 1983 decision. Tex. Exh. 79 established the human-caused shortfall in New Mexico’s Article III(a) delivery obligations for the 1950-1983 period. New Mexico offered no rebuttal.

The Special Master’s findings on this issue are clear and succinct. In regard to the testimony of the expert witness for

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1. At trial, Texas strenuously argued against the admission of any evidence concerning the Capitan Aquifer, implicating nearly 100,000 acre-feet of water, because New Mexico inadequately identified it as an issue. Tr. 22-23 (11/19/85). The Special Master indicated that in an ordinary case he probably would sustain Texas’ objection, because the issue was raised too late; however, because the litigants were two sovereign states, he overruled Texas’ objection and allowed the evidence, but concluded: “I will make it crystal-clear now on the record I will not allow any other new issues in this case.” Tr. 33 (11/19/85). Emboldened by the successful reliance on its quasi-sovereign status to inject a major new issue after trial commenced, New Mexico now seeks permission to relitigate a factual issue on which it failed over a year ago to present evidence.



Texas who was the principal author of Tex. Exh. 79, the Special Master found:

Dr. Murthy's testimony made it clear that the procedures followed in Tex. Exh. 79 accounted for all non-manmade depletions so that any residual departure was, by force of logic, the result of man's activities.

1986 Report 9. With the facts established by Dr. Murthy's testimony as a backdrop, the Special Master then explained the role of Tex. Exh. 79:

It is both logically correct and, at this stage of the proceedings, practically necessary to hold that once Tex. Exh. 79 was agreed to, the departures show therein constitute New Mexico's shortfall in the required deliveries under Article III(a) unless New Mexico can show otherwise. On the technical side she has not done so.

1986 Report 10.

At the conclusion of proceedings before the Special Master, he explained the matter to New Mexico's counsel. The explanation gives the true flavor of the issue New Mexico now tries to raise in its first exception:

SPECIAL MASTER: You [New Mexico] didn't dispute any evidence and you were on notice; if you thought there was something wrong and deficient about Texas Exhibit 79 you should have come forward last November and last December to say so and you didn't do that.

. . . . .

You were taking a very high risk, weren't you? . . . If you had any substantive evidence, you should have put it on. But you were certainly not surprised . . .

. . . . .

I expected you to put on in December any evidence

of that sort that you had. Did you have any?

MR. WHITE: Evidence on unknowns?

SPECIAL MASTER: Not on unknowns, but evidence that says no, this is not man-made.

MR. WHITE: *We put everything we had on.*

Tr. 347-49 (5/21/86) (emphasis added).

With this background, the issue becomes much simpler than New Mexico frames it. Legal inquiry into the proper allocation between the two states of the burdens of production and persuasion on whether state line departures are due to man's activities is unnecessary. Although Texas argued—and still does—that the burdens rested on New Mexico, *see* 'Texas' Response to New Mexico's Memorandum on the Burden of Proof *and* 'Texas' Response to New Mexico's Reply on the Burden of Proof, Texas met both burdens through Tex. Exh. 79, as elucidated by the testimony of Dr. Murthy, its chief preparer. Tr. 311-34 (5/21/86). That is, Texas presented evidence that the departures calculated in Tex. Exh. 79 and listed in column 7 of Table 2 of the exhibit were due to man's activities in New Mexico. The Special Master was persuaded. 1986 Report 9-10. New Mexico "put everything [it] had on," Tr. 349 (5/21/86), amounting essentially to nothing.

As the record demonstrates, New Mexico's claim that the Special Master refused to hold a hearing on the extent to which departures were due to man's activities in New Mexico is a hollow one. It received a hearing, lodging no objections to the conduct of the hearing. Later, based on the evidence introduced at the hearing, it received an adverse recommendation. Only then did New Mexico decide to argue that the hearing should have been conducted differently.

New Mexico's argument amounts to nothing more than a plea that it be given a second chance to defeat Texas' claim. This approach demeans the dignity afforded the parties by the Court's assertion of original jurisdiction over their controversy and calls for a summary overruling of New Mexico's first exception.

## II.

**The Compact and the Court's prior decisions in this case establish that New Mexico must repay the water it illegally withheld from Texas for the 1950-1983 period.**

For nearly thirteen years, this litigation has been directed towards a determination of how much water New Mexico owes Texas as a result of New Mexico's failure to abide by the obligations it assumed in Article III(a) of the Compact.<sup>2</sup> The Court remanded the case to the Special Master in 1983 for a final decision on that very issue. 462 U.S. at 574-75. In its second exception, New Mexico asks the Court to declare that these exceptions were for naught and hold that New Mexico may not be held liable for Article III(a) violations.<sup>3</sup>

If adopted, New Mexico's position would convert this case into a pointless exercise, constituting nothing more than an

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2. From the inception of the suit, New Mexico has understood that Texas was seeking an order requiring New Mexico to repay the past due water. Tr. 58 (5/20/86) (principal New Mexico water official acknowledges the point). See, e.g., New Mexico's Trial Brief Pursuant to Paragraph 5(a)(4) of the Special Master's Pre-Trial Order of October 31, 1977 (Aug. 1, 1978) (at 22: "Texas claims that it is entitled to damages and to performance . . ."). Yet, it did not raise the issue until the very end of the last of a long series of evidentiary hearings spanning twelve years. Once again, the Special Master told New Mexico that if it were a private litigant he would rule that "it was too late to raise it by a long shot." Tr. 436 (5/21/86). Nonetheless, once again, because of New Mexico's quasi-sovereign status, he allowed the issue to be raised. *Id.* See also 1986 Report 38. New Mexico's acquiescence to twelve years of litigation of the issue and its failure to object to any of the vast amount of evidence offered on the issue constitutes a waiver of its second exception. Furthermore, the law of the case precludes New Mexico's second exception.

3. New Mexico's position is even more extreme than the text states. In an appendix to the brief supporting its exceptions, New Mexico argues against inclusion in the decree of a provision requiring New Mexico to fulfill its Article III(a) obligations in the future. New Mexico's Exceptions, Appendix A, para. 1. New Mexico did not except to the Master's recommendation to insure future compliance, see 1986 Report 42-46, and, therefore, is now bound by it; nonetheless, through the objection, New Mexico has plainly asserted the view that it may violate the Compact at will without any legal accountability.

expensive, extended seminar for the Court on advanced mathematical techniques and hydrology. Even worse, it would render the Compact a nullity and threaten compacts as viable solutions to interstate disputes. Nothing in the Compact's language, the Compact's history, or the facts of this case justifies the result New Mexico seeks. On the contrary, these sources amply support the Special Master's recommendation that New Mexico repay Texas the 340,100 acre-feet of water it illegally withheld from Texas during the 1950-1983 period.

The Compact abounds with language demonstrating that it apportioned the water of the Pecos River between the two states and imposed on New Mexico a legal duty to deliver Texas its water in accordance with the apportionment. The preamble explains that the two states have agreed on the "apportionment and deliveries" of the water. Article I lists the "equitable division and apportionment" of the water as the first major purpose of the Compact. The linchpin of the Compact, Article III(a), establishes New Mexico's specific delivery duty in mandatory terms:

New Mexico *shall not* deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which *will give* to Texas a quantity of water equivalent to that available to Texas under the 1947 condition.

(Emphasis added).

Article VI establishes governing principles for the "apportionment" accomplished in Article III(a). One of the governing principles requires that the accountings be done annually using progressive three-year averages. *See* Article VI(b). Article VIII speaks of the "obligations" of the Compact. Article IX refers to "maintaining" the state line flows "required" by the Compact. Article X establishes that Texas has a "right" to the water "apportioned to it" by Article III(a), as does Article XIV in its reference to "rights established" under the Compact. Finally, Article XV mandates that the Compact become "binding and obligatory" as of June 9, 1949, the date of Congressional consent.

From the perspective of whether the Compact creates an enforceable legal relationship between Texas and New Mexico regarding the waters of the Pecos River, the Compact's language could not be clearer. New Mexico's attempted elucidation of standards for determining implied obligations is irrelevant. See New Mexico's Exceptions 30 (discussing when an obligation is implied). The obligation here is explicit. The Compact *apportions* Pecos River water between New Mexico and Texas; it *obligates* New Mexico to deliver Texas' apportioned share annually to Texas according to the Article III(a) measure; and it gives Texas the *right* to the annual deliveries of its apportioned share.

That the Compact contemplates that New Mexico shall be held accountable for any failures in meeting its delivery obligations is established by more than just its plain language. In explaining the meaning of the Compact to the Compact negotiators, Mr. Tipton, the Chair of the Engineering Advisory Committee at the time the Compact was negotiated, provided straightforward support for the interpretation demanded by the Compact itself—that is, that it creates a legally enforceable, annual delivery obligation. Regarding Article III(a), Mr. Tipton stated:

What it means is that of a given inflow Texas will receive *each year* essentially the same proportion which she received under the "1947 condition."

Subparagraph (a) of article III is a *firm obligation* on the part of New Mexico to see that Texas receives that quantity of water, and there is nothing in article III or any other place in the compact which affects in any way the obligation of New Mexico to deliver this amount of water . . .

Stip. Exh. 1, S. Doc. 109, 81st Cong., 1st Sess. (1949), at 116 [hereinafter, "S. Doc. 109"] (emphasis added). Immediately following this explanation, the Texas legal advisor engaged Mr. Tipton in a colloquy:

JUDGE KERR. [I]s it possible to determine the exact amount of water which Texas would be entitled



to receive under the varying conditions which are set out in that report?

MR. TIPTON. Yes, that is correct.

*Id.*

Even if the Compact were otherwise ambiguous, the import of these explanations is unmistakable: for each year of operation under the Compact, Article III(a) requires New Mexico to deliver to Texas a determinable amount of water. A failure to do so renders New Mexico legally accountable.

New Mexico's brief is unencumbered by a discussion of the Compact's language or Mr. Tipton's explanation of the firm annual obligation it creates. Instead, it devotes itself to a lengthy explanation of why the Compact included neither a schedule nor a system of debits and credits, arguing that, therefore, it need not meet its annual Article III(a) obligation. New Mexico's Exceptions 24-29. The premise is correct, but the conclusion drawn from it is fundamentally wrong, as the discussion above demonstrates. A very brief detour into the arcane world of interstate water compacts will help explain why New Mexico's discussion is off the mark. A compact that apportions interstate waters by a schedule of deliveries typically will include a system of debits and credits to impart some flexibility to the rigidity of a fixed delivery schedule. *See, e.g.,* Rio Grande Compact, 53 Stat. 785 (1939). Because the Pecos River basin is hydrologically complex, 1979 Report 5-6, a somewhat more flexible obligation was established so that the interrelationships of the complex factors affecting it could receive more attention. S.Doc. 109, at 117. Instead of stating New Mexico's obligation in terms of a schedule (e.g., New Mexico shall deliver X acre-feet per year to Texas), Article III(a) states the obligation in terms of a standard that incorporates the complex factors—the 1947 condition. Thus, the absence from the Compact of a schedule and a debit-credit system says nothing about whether New Mexico must pay back water it agreed to but did not deliver to Texas.

The concept that an entity such as New Mexico should have to return something (such as the water in this case) that it has



obtained illegally to those who have a legal right to it is not exactly revolutionary. The Court has stated:

[T]he obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.

*Ward v. Love County*, 253 U.S. 17, 24 (1920). In that case, a county had collected taxes on Indian allotments. A legal attack on the authority to collect them succeeded, and the Court ordered the county to repay the taxes.

Putting aside the language of the Compact anticipating the possibility that judicial enforcement of its terms might be necessary, *see* Article V(f) (Compact Commission findings not conclusive "in any court"), this Court has the power to determine the nature and extent of compact obligations between states. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). In doing so, the Court may fashion appropriate relief. *Cf. Bell v. Hood*, 327 U.S. 678, 684 (1946) (courts adjust remedies to grant necessary relief where federal rights are invaded); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (basic rule is that courts give a remedy for violation of a legal right).

Even in original jurisdiction controversies between sovereign states, such fundamental maxims of judicial power apply. "That judicial power essentially involves the right to enforce the results of its exertion is elementary." *Virginia v. West Virginia*, 246 U.S. 565, 592 (1918). In the past, the Court has been unswerving in ordering states to perform obligations to another state which they have assumed under compacts and then breached. *See, e.g., West Virginia ex rel. Dyer v. Sims, supra*, 341 U.S. 22 (state's agreed-upon contribution to compact administration to be paid, notwithstanding contrary state law); *Kentucky v. Indian*, 281 U.S. 163 (1930) (specifically enforcing state's agreement to construct a bridge). This principle extends to requiring the payment of money for a breached obligation. *Virginia v. West Virginia, supra*, 246 U.S. 565.

The same legal principles apply here. The Compact imposes annual delivery obligations on New Mexico and creates a concomitant legal right in Texas to those deliveries. New Mexico has breached those obligations, and Texas seeks recompense. It is the Court's function to order that the recompense be provided, and nothing in the compact withdraws that function. As the Court has explained:

It cannot be gainsaid that in a controversy with respect to a contract between states, as to which the original jurisdiction of this court is invoked, this court has the authority and duty to determine for itself all questions that pertain to the obligations of the contract alleged.

*Kentucky v. Indiana, supra*, 281 U.S. at 176. New Mexico was to deliver determinable amounts of water to Texas for the 1950-1983 period. The Court's authority and duty is to "enforce the result of its exertion[s]" in this case and order payback of the shortfall.

This historical background reveals that, after decades of acrimony between the two states over the Pecos River, Texas was persuaded to take the compact route to apportionment of the water rather than the route of equitable apportionment through litigation. *See, e.g.*, S. Doc. 109, at 4-8. *See also* 462 U.S. at 569 (threat of litigation prompted New Mexico's agreement to the Compact). Many times, this Court has encouraged the use of compacts to resolve interstate water conflicts and suggested that disputing states take the route chosen by Texas. *See, e.g., Colorado v. Kansas*, 320 U.S. 383, 392 (1943). The Court's adoption of New Mexico's position that an upstream state remains legally unfettered by its solemnly undertaken delivery obligations would constitute a cruel trick, not only to Texas in this case, but to any state that has taken the Court's admonitions to heart and foregone its equitable apportionment option. Texas did not bargain away its right to seek an equitable apportionment of the river in exchange for the sole relief New Mexico proposes—that is, gradual future adjustments in New Mexico's water consumption patterns that might, but would not necessarily, even more gradually increase state line flows in the future. As the Special Master cogently explains, such

relief would be meaningless and would convert the Compact into an "illusory contract." 1986 Report 40-41. This Court's 1983 decision foredooms New Mexico's argument: "It is difficult to conceive that Texas would trade away its right to seek an equitable apportionment of the river in return for a promise that New Mexico could, for all practical purposes, avoid at will." 462 U.S. at 569 (footnote omitted).

As a last resort, New Mexico simply claims that it would be inequitable to require it to pay Texas the water it owes.<sup>4</sup> Engaging once again in its penchant for trying to rejuvenate issues already resolved against it, New Mexico suggests a laches defense, New Mexico's Exceptions 32, already rejected by the Court when it approved in full the 1979 Report. 446 U.S. 540 (1980). If the equities are to be weighed, the balance tips decidedly in favor of Texas, which has been deprived over a thirty-four year period of water to which it remains legally entitled. Thirteen years of litigation have been directed at quantifying this amount with reasonable specificity, yet New Mexico has not take a single step to increase its deliveries to Texas. Tr. 55 (5/20/86). Moreover, it adamantly refuses to abide by its Compact obligations until ordered by the Court. New Mexico's chief water official testified in the concluding phase of the hearings before the Special Master:

MR. REYNOLDS. I can not and will not in administration try to enhance state-line flow until there is a Commission finding or a court decree saying that that's necessary.

Tr. 55 (5/20/86).

The Court already has ruled against New Mexico on the issue of whether it can be required to pay back to Texas the water it failed to deliver in accordance with its legal obligations under

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4. To evade its Compact obligations, New Mexico enlists the aid of *Wyoming v. Colorado*, 309 U.S. 572 (1940), in which the Court refused to issue a contempt citation against a state for a minor violation of an earlier equitable apportionment of a river. There is no legal similarity between the *Wyoming* case and this one. The violations here are massive and longstanding. In addition, this litigation is at the relief stage. The onerous burdens of proof applicable in a contempt proceeding are absent here.

the Compact. The 1983 decision does not need to be revisited. Through its second exception, New Mexico indicates that only strong words and explicit directives will suffice to impress upon it the meaning of a legal obligation and the importance of having even a sovereign state abide by a federal law to which it has consented. Texas urges the Court to provide New Mexico such words and directives.<sup>5</sup>

### III.

**The Special Master's recommended relief, including the provisions that New Mexico's water debt be repaid in thirteen years, that it be repaid in water, and that water interest be imposed if New Mexico acts in bad faith, is proper and based on a consideration of all relevant factors.**

New Mexico's final exception is to the details of the retroactive relief recommended by the Special Master. Only three specific complaints are made: to the ten-year payback period;

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5. Eight New Mexico municipalities have filed an *amici curiae* brief arguing that the Eleventh Amendment prohibits the Court's assertion of jurisdiction in this case and that the Court's doctrine for determining whether a private right of action is implied operates here to deny Texas retroactive relief under the Compact. The *amici* cities' Eleventh Amendment argument ignores two points. First, once it is delivered, the water is the property of the state, not of its citizens. See TEXAS WATER CODE ANN. § 11.021 (Vernon Supp. 1987). Second, the Court already has held that the Eleventh Amendment defense is inapplicable in interstate water disputes between two states. See, e.g., *Colorado v. New Mexico* 459 U.S. 176, 182 n.9 (1982). The *amici* cities' second argument cuts in favor of Texas, rather than against it. First, a basic reason for the Court to engage in its implied rights of action analysis is to determine whether a written provision gives private individuals a cause of action in addition to the governmental right of action apparent on its face. Here, a governmental right of action is at issue, not a private one. The governmental right of action is apparent on the face of the Compact. Second, even if the implied private rights of action analysis were applicable, it would support Texas' position. The key inquiry is into the intent of the provision. *Mid-dlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 13 (1981). The inquiry starts with the language of the provision to determine whether it is phrased in terms of the persons benefited, *Canon v. University of Chicago*, 441 U.S. 677, 692 n.13 (1979), and whether it is in mandatory terms, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 18 (1981). The intent of Texas and New Mexico is obvious. Texas is the stated beneficiary, and the obligation on New Mexico is stated as a mandate.



to the water interest provision; and to the requirement that the debt be repaid with water. New Mexico also registers a generalized complaint that the Special Master did not "balance the equities," but it points to no legal flaw, other than the three already listed, which flows from this generalized grievance. Therefore, the Court is only given three specific objections for resolution. The generalized complaint raises no separate legal issue; however, because it is used to color New Mexico's specific arguments, it will be discussed first.

### Generalized Complaint

The dissatisfaction with the Special Master's resolution which New Mexico voices in its general complaint that he did not balance the equities properly is, upon analysis, only the expression of a vague, unfocused displeasure with the results of his balancing efforts. It is exemplified by New Mexico's castigation of the Special Master for what it claims is a lack of caution in approaching his responsibilities. New Mexico's Exceptions 35.<sup>6</sup> Much of the argument supporting the vaguely-expressed dissatisfaction is devoted to deriding the Special Master for remedial recommendations in his *draft* report of March 18, 1986. The problem with New Mexico's complaint in this regard is obvious. The March 18th document was a draft report, specifically issued to give the litigants an opportunity to level criticisms at it while the Special Master still had it within his power to respond. *See, e.g.*, Tr. 315 (12/4/85); Tr. 2-3 (4/16/86) (explaining purpose for issuing report in draft form first). Not only did the Special Master devote an entire day on April 16th to oral argument on the draft report, he acceded to New Mexico's request for a hearing on relief and remedy, which was conducted over a two day period in May, 1986.

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6. Running as an undercurrent through New Mexico's exceptions is the suggestion that the Special Master was unfair to New Mexico. *See* New Mexico's Exceptions 12 (accusing him of "cut[ting] short" the proceedings); 14 (claiming he "skimmed over" a key matter, "passed [it] by swiftly," and "bolstered" his views with Texas evidence); 17 (accusing him of giving "short shrift" to a matter); 18 (claiming he "skated quickly" to decision); 33-34 (asserting he "plunged into" an issue); 35 (claiming he failed to use "the caution warranted"); and 39 (arguing that a recommendation is an "offense to New Mexico"). These examples may be only rhetorical excesses;

(Footnote continued on next page)

New Mexico's generalized complaint that the Special Master recommended the relief without balancing the equities is transparently wrong, as a perusal of the longest section of his Report reveals. 1986 Report 30-46 (section on remedy). As explained below, he gave detailed consideration to each specific exception New Mexico raises. The real problem lies elsewhere, in the origins of New Mexico's misdirected effort to lodge a generalized complaint unanchored to any specific resulting recommendation other than the three discussed below. New Mexico is trying to force arguments with some applicability to an equitable apportionment case into a compact case mold. Broad appeals to balancing the equities have a place in equitable apportionment jurisprudence, which is based on a "flexible doctrine" requiring delicate equity adjustments. *See, e.g., Colorado v. New Mexico*, 459 U.S. 176, 183 (1982). The broad appeals are inapposite here.

In the context of interstate water compacts, the difficult reconciliation of competing interests is performed by the contracting parties and embodied in the compact. The equities already have been balanced before the matter becomes one of

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(Footnote 6. continued from previous page)

however, they leave the aftertaste left by a direct allegation of unfairness. Reality belies this suggestion. Over objections from Texas, the Special Master repeatedly acceded to belated demands from New Mexico that it be allowed to present evidence on and raise major issues that, in typical civil litigation, would have been rejected. He allowed New Mexico to surprise Texas with the technically complex issue of the Capitan Aquifer, despite New Mexico's never specifying it as an issue in the twelve years it had known about it. Tr. 33 (11/19/85); Tr. 269 (12/4/85). He allowed New Mexico an evidentiary hearing on remedies after argument on the draft report and after having repeatedly warned New Mexico earlier that the late 1985 hearings were the last evidentiary hearings. Tr. 370-71 (12/4/85); Tr. 93, 113-14 (4/16/86). At the hearing on remedies, he allowed New Mexico to adduce evidence on Tex. Exh. 79 despite the fact that it had been admitted by stipulation six months earlier and despite the fact that the hearing was supposed to be on other topics. Tr. 322 (5/21/86). Finally, he allowed New Mexico to raise and brief the issue of retroactive relief after the last hearing and in spite of New Mexico's failure to raise the issue during twelve years of litigation devoted exclusively to the facts underlying the issue. Tr. 436 (5/21/86). The Special Master was highly indulgent of New Mexico's proclivities to extend the proceedings through the last-minute injection of new issues. No fair-minded reading of the record can result in any other conclusion than that New Mexico was given a full and fair opportunity to present its case. That it failed cannot be blamed on the Special Master.



judicial concern. Often, the compact balances interests differently than the Court, acting without textual guidance, would. Article X of the Compact exemplifies the difference. In an equitable apportionment case, failure to use water typically results in a relinquishment of the right to it. *See, e.g., Colorado v. New Mexico, supra*, 459 U.S. at 184-85. In Article X, on the other hand, Texas and New Mexico agreed that non-use by one state does not effectuate relinquishment.

Thus, the Court should not allow New Mexico's generalized complaint about balancing the equities to cast an unfavorable light on complaints about specific portions of the remedial recommendations. The record reveals that the Special Master's recommendations are based upon a thorough assessment of the equities lying on both sides but within the confines of the Compact.

#### **Ten-year payback period**

New Mexico's specific objection to the delivery requirements which the Special Master recommends is to the ten-year payback period. New Mexico does not offer the Court any recommended alternative payback period or any standard for determining it.

Actually, the recommended payback period extends much longer than ten years. The payback would be for water owed only through 1983, it would run only from the date a decree is issued by the Court, and it would include an initial three-year grace period. Thus, assuming the Court enters a decree in July, 1987, Texas would finally have received the water New Mexico illegally withheld from it through 1983 in the year 2000. This is a seventeen year payback period. If anything, the equities favor a shorter payback period because, assuming New Mexico complies in good faith with the decree, Texas will receive no interest on the water illegally withheld from it over a thirty-four year period. In effect, New Mexico will have retained in some measure the fruits of its illegal actions for over a half century without paying any penalty. By any standard, this result is not unfair to New Mexico.

The Special Master gave careful consideration to the concerns

New Mexico expressed about the payback period. Even though he recognized that "the longer Texas must wait [for the water], the less the value of what she receives," 1986 Report 42, the Special Master recommended that New Mexico be given a three-year grace period to make preparations for its repayment deliveries. *Id.* 36. Notwithstanding Article X of the Compact, he even took into account whether Texas could use the water and concluded that "[c]learly, Texas can make use of the water that it is entitled to but has been deprived of for the last 30 years." *Id.* 42.

### Water interest

New Mexico devotes a short two paragraphs to its argument against the inclusion of any water interest requirement in the decree. New Mexico's Exceptions 39. Any evaluation of the validity of this component of the recommended relief must begin with a recognition that it is not "interest on a judgment" as that concept typically is understood. First, it is contingent. It would not accumulate at all if New Mexico operates in good faith under the decree. Second, even if New Mexico did not operate in good faith, the interest would not begin to accumulate until at least five years after the payback period begins to run. Under the assumption that the Court enters a decree in mid-July, 1987, the earliest the interest could begin to accumulate would be the middle of 1995, twelve years after the last of the illegal water diversions adjudicated in this case.

Thus, the Court cannot evaluate the challenged water interest concept under legal standards derived from decisions about whether interest on a judgment is permissible. Instead, the concept must be evaluated as would any other provision in an equitable decree. Is it carefully crafted to remedy the harm done?

When a federal statute creates an obligation but contains no prohibition of interest on the obligation, the Court "weighs the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed." *Rodgers v. United States*, 332 U.S. 371, 373 (1947). The general rule is that the equities will be weighed to allow interest for the party to which the obligation is owed and which has been harmed by a breach

of the obligation. *Id.* Application of these equity principles to this case easily supports the Special Master's interest recommendation. The Compact is a federal law, 462 U.S. at 564, containing no prohibition on the award of interest for breaches of the obligations it creates. New Mexico has breached its obligation to Texas which has been harmed by the breach. As *Rodgers* holds, the interest in such a situation may be awarded to insure full compensation for the loss. It surely follows then that the recommended water interest, which is only contingent and does not extend itself even as far as the *Rodgers* principle, is appropriate.

### Monetary alternative

New Mexico concludes its exceptions with a request that the Court allow it the option of repaying its water debt to Texas in money. New Mexico's Exceptions 39-40. The use of the term "request" is deliberate. New Mexico offers no argument in support of the request and cites no authority in support of it. The real reason for the request is revealed in its last sentence. *Id.* 40. The Court's granting of it would necessitate a remand to the Special Master for further evidentiary proceedings because no hearing has been conducted on the fair market value of the water New Mexico owes Texas. New Mexico never availed itself of the opportunity to request such a hearing and never posited the monetary alternative as a legal issue. There is no basis for further delaying the resolution of this case by indulging once again New Mexico's habit of manufacturing new issues which inevitably result in the postponement of its day of reckoning under the Compact. In the past the Court has ordered a state to perform the specific obligation it had assumed but breached. See *Kentucky v. Indiana, supra*, 281 U.S. 163. It should do the same here. New Mexico has failed to perform its water delivery obligation to Texas. After thirty-seven years under the Compact and thirteen years of litigation before this Court, New Mexico should finally be required to fulfill its broken promise to Texas. It has no further excuses for delay. Texas' portion of the Pecos River should be returned to it in accordance with the Special Master's recommendation.

## CONCLUSION

For the foregoing reasons, the exceptions of the State of New Mexico to the Report of the Special Master should be overruled. "A river is more than an amenity, it is a treasure." *New Jersey v. New York*, 283 U.S. 336, 342 (1931). After formally agreeing with Texas to the division of the treasure, New Mexico withheld a large part of it. The Special Master's Report recommends a final resolution of this case which will restore to Texas its bargained-for share of the treasure and insure it receives its share in the future.

Respectfully submitted,

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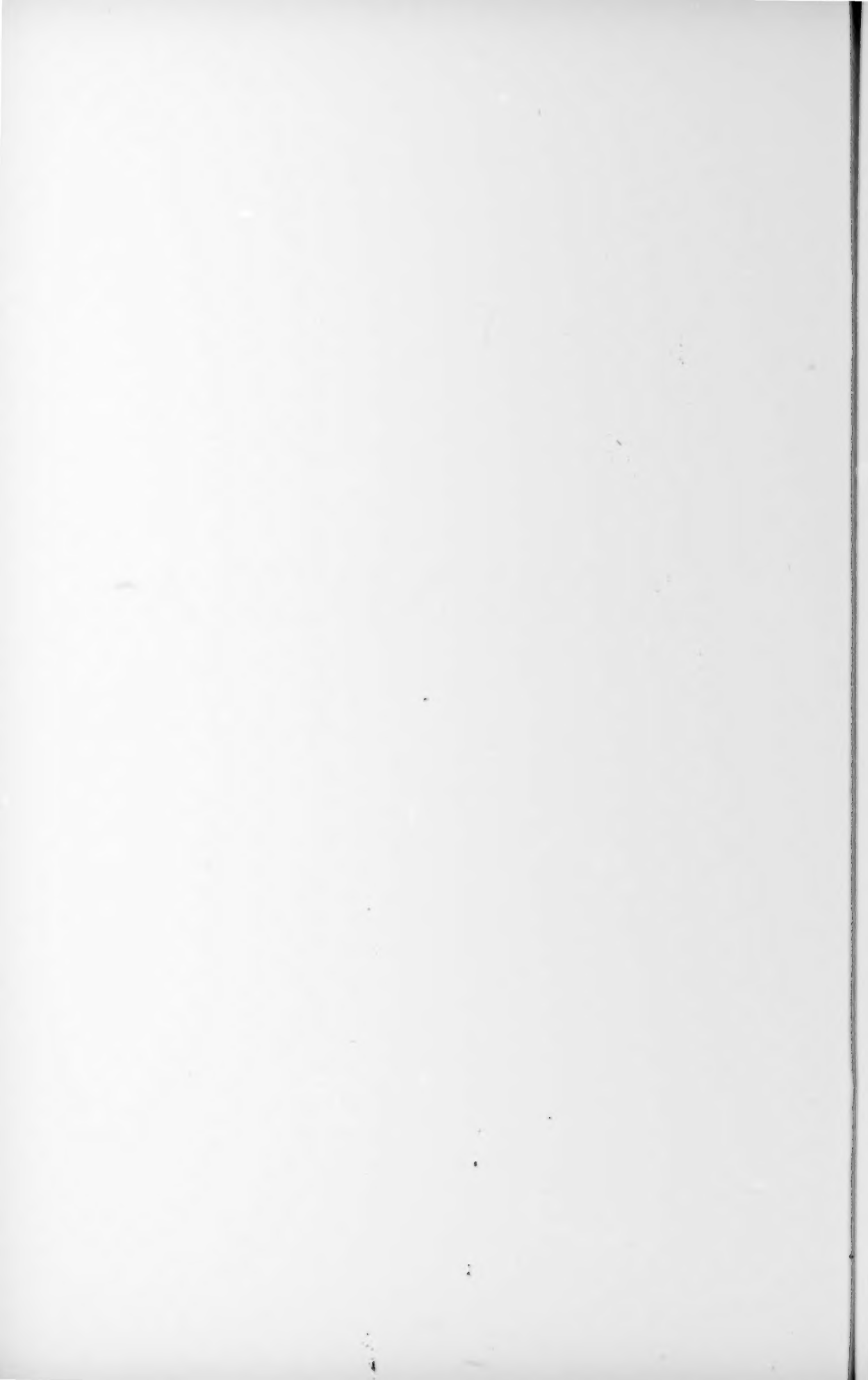
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*January 20, 1987*

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NO. 65, Original

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

---

STATE OF TEXAS, *Plaintiff,*

v.

STATE OF NEW MEXICO, *Defendant,*  
and

UNITED STATES OF AMERICA, *Intervenor.*

---

Before the Special Master: Charles J. Meyers

**PRETRIAL ORDER**

The proceedings in this matter shall be governed by the following order.

**I. Hearing.**

A Hearing on the disputed issues of fact listed below shall be held in Denver, Colorado, on November 18-22, 26-27 and if necessary on December 3-4, 1985.

**II. Disputed Issues of Fact.**

**A. Texas Statement.**

The computation of indicated departures.

1. What is the proper loss equation for channel loss, Artesia to Damsite 3, for the 1954-83 period?
2. What are the proper area-capacity relations to be used to compute evaporation losses from the McMillan and Avalon Reservoirs for the 1950-83 period?

3. Are the evaporation losses from Tansill Lake to be counted as depletions between the Carlsbad canal flume and the Carlsbad gage in the flood inflow computations for the 1950-83 period?

The causes of depletions.

4. During the 1950-83 period:

- (a) was there any increase or decrease in depletions due to man's activities above Alamogordo Dam and, if so, how much were they?
  - (b) were there any depletions resulting from construction of the training dike in Lake McMillan in the early 1950's and, if so, how much were they?
  - (c) were there any depletions above the stateline gage which are assignable to Texas and, if so, how much were they?
  - (d) were there any depletions above the stateline gage caused by the transfer of water rights from downstream of Alamogordo Dam to upstream of it and, if so, how much were they?
5. Are the indicated departures, if any, to be adjusted for the matters referred to in 4(a)-(d), above, to arrive at New Mexico's delivery obligations under the Pecos River Compact ("Compact") for the 1950-83 period?

B. New Mexico Statement.

The computation of indicated departures.

1. Whether the loss equation for channel loss, Artesia to Damsite 3, for the 1954-83 period shall be developed using the least absolute value procedure, as was done in defining the 1947 condition, or a modified least absolute value procedure.

2. Whether the area-capacity relation for a given sediment survey should be used to compute evaporation losses from the McMillan and Avalon Reservoirs until the next survey is available or whether a particular sediment survey should be used to compute evaporation losses for a period of years before and after the date of the survey.
3. Whether evaporation losses from Tansill Lake should be excluded as a depletion between the Carlsbad canal flume and the Carlsbad gage in the flood inflow computations as was done in defining the 1947 condition.

The causes of depletions.

4. During the 1950-83 period:
  - (a) was there any increase or decrease in depletions due to man's activities above Alamogordo Dam and, if so, how much were they;
  - (b) what were the depletions caused by the training dike constructed in Lake McMillan in the early 1950's;
  - (c) were there any depletions above the stateline gage which are assignable to Texas and, if so, how much were they?

### III. Disputed Issues of Law.

#### A. Texas Statement.

- a. Is New Mexico prohibited from reducing its delivery obligations under the Compact for reductions, if any, in depletions by man's activities above Alamogordo Dam?
- b. Are the depletions, if any, that were caused by the construction and use of the training dike in Lake

McMillan assignable as depletions due to man's activities?

- c. What is the appropriate form of relief for New Mexico's violations, if any, of its delivery obligations under the Compact for the 1950-83 period?
- d. Is prospective relief available and proper and, if so, what is its appropriate form?

**B. New Mexico Statement.**

- a. Should the procedures used to determine indicated departures for the 1950-83 period be consistent with the procedures used to determine the 1947 condition.
- b. Are Texas and New Mexico prohibited by the Compact or precluded by the prior rulings in this case from claiming adjustments in indicated stateline departures for any increase or decrease in depletions by man's activities above Alamogordo Dam.
- c. Are the depletions, if any, during the 1950-83 period that were caused by the construction and use of the training dike in Lake McMillan assignable as depletions due to man's activities.
- d. Whether the Pecos River Commission's findings on indicated departures for the 1950-61 period preclude Texas from litigating matters of fact that were previously resolved by the Commission.

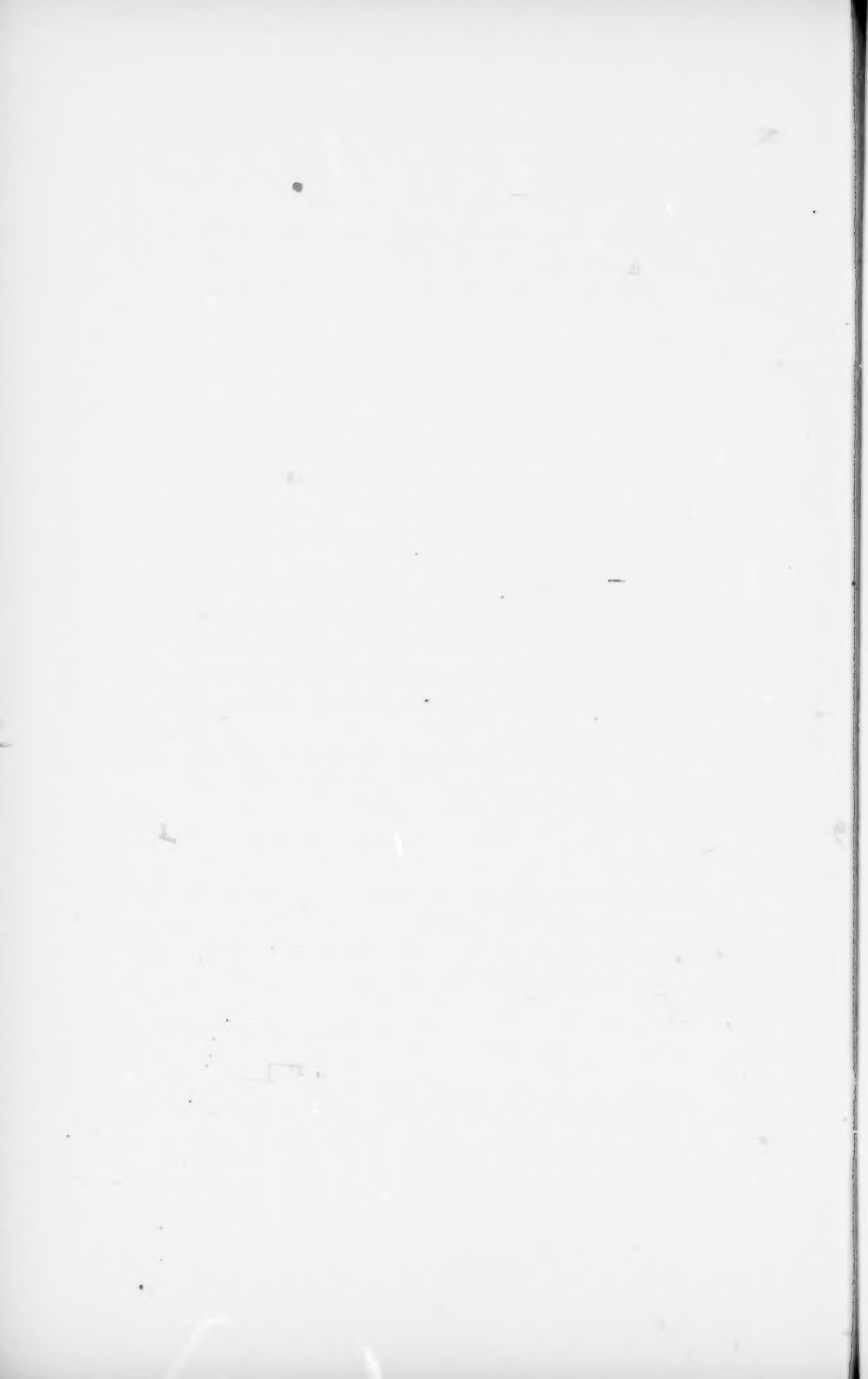
[Paragraphs IV—VI omitted]

DATED: October 10, 1985.

/s/

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Charles J. Meyers  
Special Master



## APPENDIX B

### RESPONSE TO NEW MEXICO'S OBJECTIONS TO PROPOSED DECREE

In Appendix A of its exceptions, New Mexico makes six objections to the Special Master's proposed decree. Texas supports the Special Master's proposed decree, with the modifications proposed by Texas in Appendix B of its exception, and requests that it be entered by the Court. Texas will respond to New Mexico's objections in the numerical order in which they are set out in Appendix A to New Mexico's exceptions.

1. Sections II(A) and II(B) of the proposed decree do not deprive the Pecos River Commission of its discretionary powers under the Compact. The Court has previously determined that, where the Commission has not adopted "a more feasible method" for determining departures, the Court may decide whether a particular method may be used under the provisions of the Compact to measure departures in enforcing the Compact. *See Texas v. New Mexico*, 462 U.S. 554, 573 (1983). The Court made such a decision regarding Tex. Exh. 68 when it approved the 1984 Report, thereby adopting the Special Master's recommendation that the inflow-outflow equation in Tex. Exh. 68 at page 2 be used to determine departures from New Mexico's Article III(a) delivery obligations. *Texas v. New Mexico*, 467 U.S. 1238 (1984). Similarly, the Court may, and should, decide that Tex. Exh. 79 will be used to calculate the index inflow component of the inflow-outflow equation in Tex. Exh. 68 at page 2, as specified in Section II(B) of the proposed decree.

The equations and procedures in Tex. Exh. 79 will allow the Commission to accurately compute flood inflows in future years. If the states eventually determine and agree that the equations or procedures in Tex. Exh. 79 should be changed, or that a different method of river accounting should be adopted, the states may jointly apply to the Court to lift or modify the injunctive provisions of the decree.

2. The appointment of a river master is permissible and warranted if the Court determines that it is necessary to enforce



the Court's decree. The Special Master noted that the Court might wish to appoint a river master "for the sole purpose of determining whether New Mexico has complied with the decree." 1986 Report 43. Certainly the Court is free to fashion such relief as is necessary for that purpose.

Texas is not now requesting the Court to appoint a river master. Texas believes that the Special Master's proposed decree contains the mechanisms and sufficient incentive for compliance and would, if adopted by the Court, adequately protect Texas' interests in this matter. Should New Mexico later prove unwilling to comply with the decree, Texas may, to secure compliance, either request the appointment of a river master or move for the entry of an order of contempt.

3. New Mexico's complaint regarding Section II of the proposed decree, that certain adjustments are not included in either Tex. Exh. 68 or in Tex. Exh. 79, is wholly without merit, since the Special Master has recognized that Tex. Exh. 79 will have to be modified or adjusted to conform to the Court's decisions on man-made depletions chargeable to New Mexico. 1986 Report A-1, n.1.

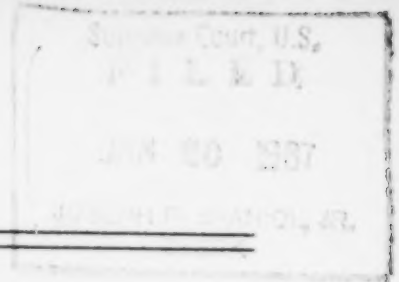
4. Section II(A) of the proposed decree correctly requires that the inflow-outflow equation in Tex. Exh. 68 at page 2 be used to determine New Mexico's Article III(a) delivery obligation. This is in conformity with the Court's approval of the 1984 Report in which the Special Master recommended that the equation be used for this purpose. 467 U.S. 1238 (1984).

Ignoring this prior approval by the Court, New Mexico argues that the inflow-outflow equation in Tex. Exh. 68 at page 2 must be adjusted for variations in factors such as the location of flood inflows, reservoir operation, and precipitation. This argument, however, overlooks the fact that the inflow-outflow equation was derived from many years of complex hydrologic data, which included variations in such factors, and the equation is, therefore, designed for, and compatible with, complex hydrology. See Tex. Exh. 68 at 1-19. The argument also ignores the adjustment flexibility inherent in the progressive three-year averages required by Article VI(b) of the Compact.

5. Section II(C) of the Special Master's proposed decree is clear that no more than 340,100 acre-feet of water are required to be repaid to Texas over a ten-year period. New Mexico is to satisfy this repayment duty by delivering to the Texas state line, during each year of the ten-year period, an Annual Minimum Delivery Obligation of at least 34,010 acre-feet, after having delivered its annual delivery obligation under Article III(a) of the Compact. Any quantity of water delivered in excess of the Annual Minimum Delivery Obligation would necessarily be credited towards, and reduce, the total amount required to be repaid.

6. The reference in Section IV of the proposed decree to "Section II(B)" is obviously a typographical error. The correct reference should be to "Section II(C)," as was pointed out on page 6 of Texas' exception.

8  
No. 65, Original



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

STATE OF TEXAS,

*Plaintiff,*

vs.

STATE OF NEW MEXICO,

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**Texas' Reply to New Mexico's Exceptions**

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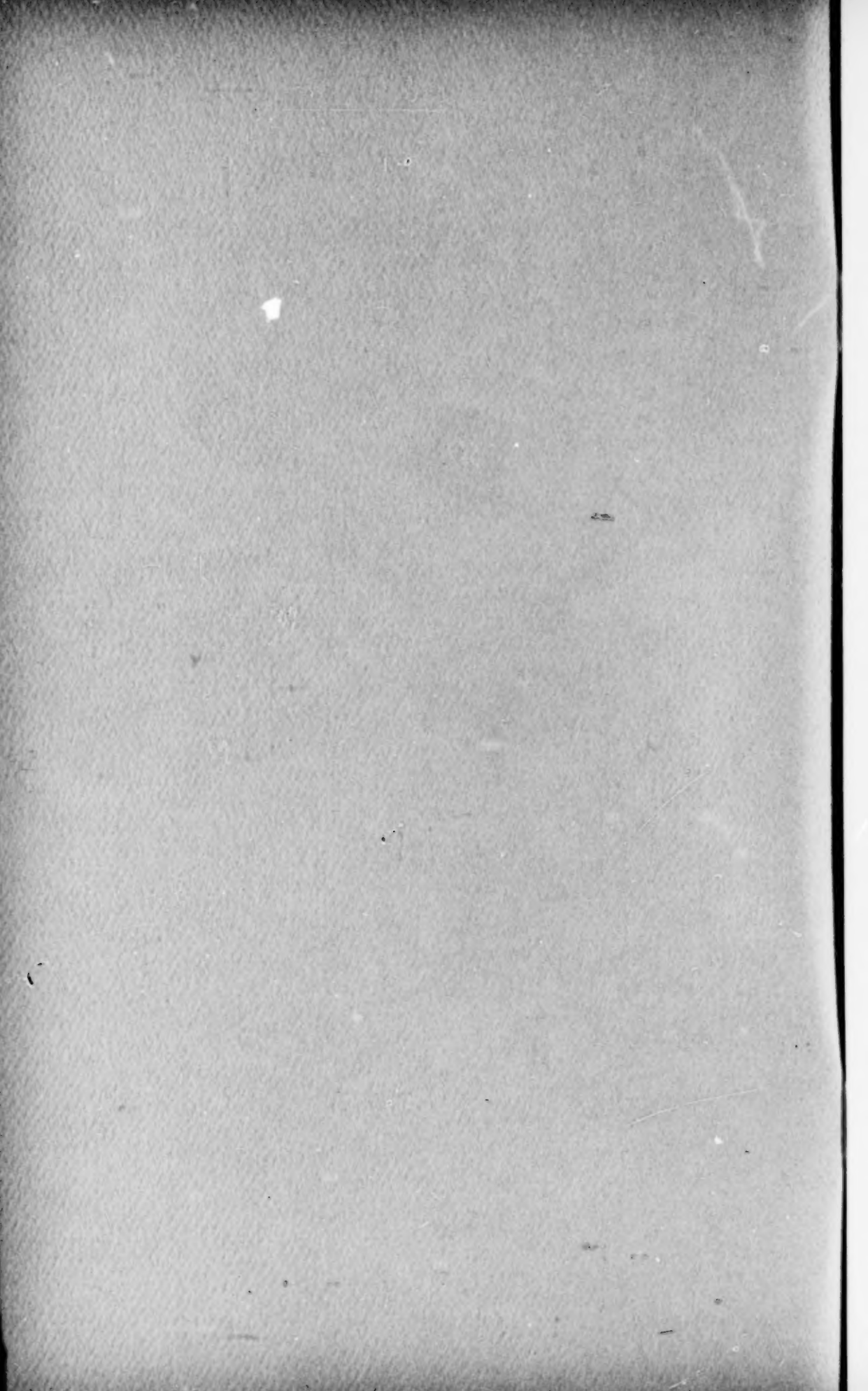
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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
SUMMARY OF ARGUMENT .....	3
ARGUMENT:	
I. In the final evidentiary hearing before the Special Master, Texas proved the extent to which state line departures were due to man's activities, and New Mexico offered no rebuttal .....	5
II. The Compact and the Court's prior decisions in this case establish that New Mexico must repay the water it illegally withheld from Texas for the 1950-1983 period .....	10
III. The Special Master's recommended relief, including the provisions that New Mexico's water debt be repaid in thirteen years, that it be repaid in water, and that water interest be imposed if New Mexico acts in bad faith, is proper and based on a consideration of all relevant factors ..	17
CONCLUSION .....	23
APPENDIX A (October 10, 1985 Pretrial Order) .....	A-1
APPENDIX B (Reponse to New Mexico's Objections to Proposed Decree) .....	B-1

## TABLE OF AUTHORITIES

Cases:	Page
<i>Bell v. Hood</i> , 327 U.S. 678 (1946) .....	14
<i>Cannon v. University of Chicago</i> , 441 U.S. 677 (1979) .....	17
<i>Colorado v. Kansas</i> , 320 U.S. 383 (1943) .....	15
<i>Colorado v. New Mexico</i> , 459 U.S. 176 (1982) .....	17,19,20
<i>Kentucky v. Indiana</i> , 281 U.S. 163 (1930) .....	14,15,22
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803) .....	14
<i>Middlesex County Sewerage Authority v. National Sea Clammers Association</i> , 453 U.S. 1 (1981) .....	17
<i>New Jersey v. New York</i> , 283 U.S. 336 (1931) .....	23
<i>Pennhurst State School and Hospital v. Halderman</i> , 451 U.S. 1 (1981) .....	17
<i>Rodgers v. United States</i> , 332 U.S. 371 (1947) .....	5,21,22
<i>Texas v. New Mexico</i> , 468 U.S. 1202 (1984) .....	2
<i>Texas v. New Mexico</i> , 467 U.S. 1238 (1984) .....	1,B-1,B-2
<i>Texas v. New Mexico</i> , 462 U.S. 554 (1983) ....	2,10,15,16,22,B-1
<i>Texas v. New Mexico</i> , 446 U.S. 540 (1980) .....	16
<i>Virginia v. West Virginia</i> , 246 U.S. 565 (1918) .....	14
<i>Ward v. Love County</i> , 253 U.S. 17 (1920) .....	14
<i>West Virginia ex rel. Dyer v. Sims</i> , 341 U.S. 22 (1951) .....	14
<i>Wyoming v. Colorado</i> , 309 U.S. 572 (1940) .....	16
Constitution and Statutes:	
U.S. Const. amend. 11 .....	17
Pecos River Compact, 63 Stat. 159 (1949) .....	<i>passim</i>



<b>Cases:</b>	<b>Page</b>
Rio Grande Compact, 53 Stat. 785 (1939) . . . . .	13
TEXAS WATER CODE ANN. § 11.021 (Vernon Supp. 1987)	17



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

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STATE OF TEXAS,

*Plaintiff,*

vs.

STATE OF NEW MEXICO,

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---

**Texas' Reply to New Mexico's Exceptions**

Texas submits this reply to New Mexico's exceptions to the Special Master's Report. Citations to transcribed proceedings before him will be to the transcript page, followed by the date of the proceeding.

**STATEMENT OF THE CASE**

New Mexico lays little emphasis on the technical issues of fact which consumed the overwhelming bulk of the energies of the parties, the Special Master, and his technical consultant. Instead, the cast of its exceptions is predominantly toward the order and manner of proceedings before the Special Master. Therefore, the following map of the proceedings is provided to aid the Court in threading its way through the issues presented by New Mexico's exceptions.

On June 11, 1984, the Court summarily approved the 1984 Report of the Special Master, thereby establishing the formula for determining the quantity of water Texas would have received under the 1947 condition of the Pecos River each year of the 1950-1983 period. *Texas v. New Mexico*, 467 U.S. 1238 (1984). The decision left two basic issues for resolution in this case: the amount of shortfall in the annual river deliveries to Texas for the 1950-1983 period; and the extent to which the shortfalls were due to man's activities in New Mexico.

Shortly after the 1984 decision, the Court accepted the resignation of the previous Special Master and appointed his replacement, Mr. Charles J. Meyers. 468 U.S. 1202 (1984). Since his mid-1984 appointment, the new Special Master has stressed to the litigants his intention to complete work on the two remaining basic issues and forward his final recommendations to the Court so that it may render the "final decision" foreseen at the time of the 1983 remand of the case, *Texas v. New Mexico*, 462 U.S. 554, 556 (1983). See, e.g., May 22, 1985 Order, para. 7 (ordering counsel to prepare for November, 1985 trial on the merits); June 26, 1985 Letter to Counsel (setting trial dates). The parties lodged no objections to the plan and, accordingly, moved along the litigation course marked by the Special Master.

Under the Special Master's direction, documents were exchanged, and telephone conference calls and meetings were conducted. Then, on October 10, 1985, the Special Master entered a Pretrial Order governing the conduct of the trial on the merits which was to commence on November 18, 1985. The relevant portions of the October 10, 1985 Pretrial Order are reproduced in Appendix A to this reply.

The trial commenced as planned on November 18, 1985, and continued on November 19th, December 3rd, and December 4th. At the conclusion of the December 4th hearing, repeating his earlier admonitions, see, e.g., May 22, 1985 Order, para. 7, the Special Master reiterated that the late 1985 hearings were to be the last evidentiary hearings. Tr. 370-71 (12/4/85). See also Tr. 313-14 (Tr. 12/4/85).

In March, 1986, the Special Master issued a draft report, and in a transcribed proceeding on April 16th, heard oral argument on it. Two days later, he acceded to a request from New Mexico and set a hearing, which was to be limited to evidence on the amount of acreage in New Mexico that would be taken out of cultivation at four alternative rates of repayment of the water debt and the economic consequences of such reduced cultivation. April 18, 1986 Order. The hearing occurred on May 20th and 21st, with limited evidence also taken on the meaning of a Texas exhibit that had been introduced at the December 3rd hearing.

In late July, 1986, the Special Master forwarded his final Report to the Court, where it was ordered filed on October 6, 1986. In the Report, the Special Master makes recommendations for the resolution of all the remaining issues in the case. These recommendations, in summary, are that New Mexico have to pay back to Texas 340,100 acre-feet of water over a thirteen year period (consisting of a contingent three year grace period, followed by ten years for repayment) and that New Mexico be placed under an injunction that will result in its having to fulfill its future delivery obligations under the Pecos River Compact ("Compact"). New Mexico has filed exceptions to the 1986 Report, and Texas now replies to those exceptions. New Mexico also listed its objections to the Special Master's Proposed Decree in an appendix. New Mexico's Exceptions, Appendix A. Texas' response to the objections is in Appendix B to this reply.

### SUMMARY OF ARGUMENT

New Mexico has elevated its belatedly-raised afterthoughts in this case to the only issues it is raising. Each of its three exceptions should be overruled.

In its first exception, New Mexico argues that the Special Master failed to conduct an evidentiary hearing on the extent to which man's activities in New Mexico caused negative departures from the 1947 condition. To put it bluntly, the argument is groundless and flatly contradicted by the record. The record demonstrates that New Mexico has fundamentally mischaracterized the course of proceedings before the Special Master. For at least a half year, New Mexico was formally on notice that a final hearing was to be conducted in this case and that man's activities was to be litigated in that hearing. Every factual issue listed by New Mexico in the governing pretrial order was litigated and decided. New Mexico registered no objection to the subject matter litigated at the final hearing and was repeatedly informed that the hearing was the last one. Texas introduced persuasive evidence establishing the extent to which negative departures were due to man's activities in New Mexico. New Mexico offered no evidence. It was only well after the conclusion of the final hearing and after the Special Master had issued a draft report finding Texas' evidence

persuasive, that New Mexico objected to the proceedings. Its objection is nothing more than a bold, but baseless, effort to obtain a second chance to litigate an issue that it already has lost. The fact that it has lost the issue is not a ground for its being allowed to try it again.

In its second exception, New Mexico argues that, under the Pecos River Compact, it does not have to repay Texas 340,100 acre-feet of water it failed to deliver in accordance with Article III(a) of the Compact. For thirteen years, this litigation has been directed toward a determination of the amount of water New Mexico owes Texas. The Court's 1983 decision left that determination as the only remaining issue and constitutes the law of the case. There is no reason to reexamine the decision. Even if there were, the Compact's language and structure and the history of its development establish that New Mexico's Article III(a) water delivery obligation to Texas is a firm one that is to be performed annually. Through the Compact, Texas has a contractual right to the water, and New Mexico has a contractual obligation to deliver it. The Court has the power to order compliance with the Compact, including the power to order repayment when the Compact's delivery requirements are violated. The Court's acceptance of New Mexico's argument that it may violate its Compact obligations and not be held legally accountable would constitute a grave injustice to Texas, which entered into the Compact instead of seeking an equitable apportionment of the Pecos River, and would discourage other states from resolving their disputes through compacts. The Court has been unstinting in ordering non-compliant states to abide by their contractual obligations, and there is no reason New Mexico should be excused from abiding by the Court's long-established principles.

In its third exception, New Mexico argues against three specific aspects of the relief recommended by the Special Master. It disagrees with the recommended period for repayment of its debt to Texas, but it offers the Court neither a standard for determining what the period should be nor its own view of the appropriate period. Assuming the Court decides this case in 1987, New Mexico's water debt to Texas would be finally repaid seventeen years after the last violation adjudicated thus far in the case and a half century after the first violation. By



any applicable standard, this payback period is fair. Its fairness is enhanced because, if New Mexico complies with the decree in good faith, it will not have to pay any interest on its debt. New Mexico also disputes the Court's authority to order that interest be paid on the debt New Mexico has accrued due to its Compact violations. The interest will not be imposed at all unless New Mexico acts in bad faith. Even if New Mexico acts in bad faith, it does not begin to run until 1995, eight years into the payback period. Even if full interest payments had been ordered, the principles established in *Rodgers v. United States*, 332 U.S. 371 (1947), would validate the requirement. It necessarily follows that a less onerous interest requirement is valid. Finally, New Mexico asks the Court for permission to repay its debt in money instead of water. New Mexico did not present this argument to the Special Master as an issue. It offers no authority in support of its argument. The reason for its request for a money alternative is clear. The Court's granting of it would necessitate a remand to the Special Master for further evidentiary hearings on the fair market value of the past-due water, thereby further postponing New Mexico's day of reckoning under the Compact. No further delay should be countenanced. New Mexico should be ordered to begin complying with the Compact and to begin the repayment of the water it has illegally withheld from Texas.

## ARGUMENT

### I.

**In the final evidentiary hearing before the Special Master, Texas proved the extent to which state line departures were due to man's activities, and New Mexico offered no rebuttal.**

In setting the stage for its first exception—that “the master refused to hold an evidentiary hearing on the extent to which departures were due to man's activities in New Mexico,” New Mexico's Exceptions, at i & 14—New Mexico has fundamentally mischaracterized the course of proceedings before the Special Master. The problem is not that the Special Master refused to hold a hearing on the effects of man's activities on New Mexico's departures from its Article III(a) delivery obliga-

tions. He did hold such a hearing. The problem, instead, is that, when given the opportunity, New Mexico offered no evidence at all to rebut Texas' proof on the issue. The fault, as the record demonstrates, lies with New Mexico, not the Special Master.

After the Court's 1984 decision and appointment of the new Special Master, New Mexico, as well as Texas, had nearly a year and a half to prepare for the final trial on the merits which commenced in November, 1985. In an order entered in May of 1985, the Special Master forewarned the parties that they "should prepare for a trial on the merits in November, 1985 of the issue of depletions caused by man's activities." May 22, 1985 Order, para. 7. Neither state objected. That New Mexico understood and accepted the import of the May 22nd admonition is clear from a statement of its counsel at the commencement of the evidentiary hearing on November 19, 1985. He acknowledged that the Special Master's May 1985 directive contemplated that the November trial would be "on all remaining issues of fact . . ." Tr. 28 (11/19/86).

The October 10, 1985 Pretrial Order provided the parties the opportunity and duty to list "all remaining issues of fact," as well as of law, to be resolved through the November trial. New Mexico's statement of the remaining disputed issues of fact on the "causes of depletions" are listed in Part II.B.4(a)-(c) of the Pretrial Order, p. A-3, *infra*. The only three listed factual disputes over the causes of depletions concern what came to be known as the Upper Reach issue, the McMillan dike issue, and the Capitan Aquifer issue. New Mexico lists no other disputed causes of depletion.

As the evidentiary proceedings drew to a close, the Special Master urged the parties to work toward an amicable settlement of "these three issues that are outstanding," listing the same three issues New Mexico had listed in the Pretrial Order. Tr. 319-20 (12/4/85). No settlement was reached, and the Special Master has made recommendations on the resolution of each of the three issues—the Upper Reach, 1986 Report 22-26; the McMillan dike, 1986 Report 11-22; and the Capitan Aquifer, 1986 Report 26-30. New Mexico has accepted all three recommendations. New Mexico Exceptions 6.

The picture revealed by a review of proceedings before the Special Master is radically different than the one painted by New Mexico. The Special Master gave New Mexico ample opportunity to raise the factual issues it thought appropriate for trial, even to the point of granting it special indulgence, because of its quasi-sovereign status, to litigate the Capitan Aquifer matter—a tardily raised, technically complex issue of potentially enormous significance.<sup>1</sup> D

Yet, on the factual issue which it now characterizes as “critical,” *see* New Mexico’s Exceptions 12, New Mexico chose repose. When Texas offered into evidence the document which accounted for all causes of departures other than human ones, New Mexico stipulated to it. Tr. 11-12 (11/18/85) (admission into evidence of Tex. Exh. 73; agreement to subsequent modification); Tr. 103 (12/3/85) (admission into evidence of Tex. Exh. 79, modifying Tex. Exh. 73). New Mexico offered no subsequent testimony or other evidence to rebut Tex. Exh. 79.

The basis for New Mexico’s approach on this issue is unknown and undisclosed. The possible explanations run the speculative gamut from an absence of technically supportive evidence, through subtle, but misdirected, trial strategy, to outright oversight. Whatever the reasons, the fact remains that Texas came forward with evidence which answered the “two subsidiary questions” posed by the Court in its 1983 decision. Tex. Exh. 79 established the human-caused shortfall in New Mexico’s Article III(a) delivery obligations for the 1950-1983 period. New Mexico offered no rebuttal.

The Special Master’s findings on this issue are clear and succinct. In regard to the testimony of the expert witness for

---

1. At trial, Texas strenuously argued against the admission of any evidence concerning the Capitan Aquifer, implicating nearly 100,000 acre-feet of water, because New Mexico inadequately identified it as an issue. Tr. 22-23 (11/19/85). The Special Master indicated that in an ordinary case he probably would sustain Texas’ objection, because the issue was raised too late; however, because the litigants were two sovereign states, he overruled Texas’ objection and allowed the evidence, but concluded: “I will make it crystal-clear now on the record I will not allow any other new issues in this case.” Tr. 33 (11/19/85). Emboldened by the successful reliance on its quasi-sovereign status to inject a major new issue after trial commenced, New Mexico now seeks permission to relitigate a factual issue on which it failed over a year ago to present evidence.

Texas who was the principal author of Tex. Exh. 79, the Special Master found:

Dr. Murthy's testimony made it clear that the procedures followed in Tex. Exh. 79 accounted for all non-manmade depletions so that any residual departure was, by force of logic, the result of man's activities.

1986 Report 9. With the facts established by Dr. Murthy's testimony as a backdrop, the Special Master then explained the role of Tex. Exh. 79:

It is both logically correct and, at this stage of the proceedings, practically necessary to hold that once Tex. Exh. 79 was agreed to, the departures show therein constitute New Mexico's shortfall in the required deliveries under Article III(a) unless New Mexico can show otherwise. On the technical side she has not done so.

1986 Report 10.

At the conclusion of proceedings before the Special Master, he explained the matter to New Mexico's counsel. The explanation gives the true flavor of the issue New Mexico now tries to raise in its first exception:

SPECIAL MASTER: You [New Mexico] didn't dispute any evidence and you were on notice; if you thought there was something wrong and deficient about Texas Exhibit 79 you should have come forward last November and last December to say so and you didn't do that.

. . . . .

You were taking a very high risk, weren't you? . . . If you had any substantive evidence, you should have put it on. But you were certainly not surprised . . .

. . . . .

I expected you to put on in December any evidence

of that sort that you had. Did you have any?

MR. WHITE: Evidence on unknowns?

SPECIAL MASTER: Not on unknowns, but evidence that says no, this is not man-made.

MR. WHITE: *We put everything we had on.*

Tr. 347-49 (5/21/86) (emphasis added).

With this background, the issue becomes much simpler than New Mexico frames it. Legal inquiry into the proper allocation between the two states of the burdens of production and persuasion on whether state line departures are due to man's activities is unnecessary. Although Texas argued—and still does—that the burdens rested on New Mexico, *see* Texas' Response to New Mexico's Memorandum on the Burden of Proof *and* Texas' Response to New Mexico's Reply on the Burden of Proof, Texas met both burdens through Tex. Exh. 79, as elucidated by the testimony of Dr. Murthy, its chief preparer. Tr. 311-34 (5/21/86). That is, Texas presented evidence that the departures calculated in Tex. Exh. 79 and listed in column 7 of Table 2 of the exhibit were due to man's activities in New Mexico. The Special Master was persuaded. 1986 Report 9-10. New Mexico "put everything [it] had on," Tr. 349 (5/21/86), amounting essentially to nothing.

As the record demonstrates, New Mexico's claim that the Special Master refused to hold a hearing on the extent to which departures were due to man's activities in New Mexico is a hollow one. It received a hearing, lodging no objections to the conduct of the hearing. Later, based on the evidence introduced at the hearing, it received an adverse recommendation. Only then did New Mexico decide to argue that the hearing should have been conducted differently.

New Mexico's argument amounts to nothing more than a plea that it be given a second chance to defeat Texas' claim. This approach demeans the dignity afforded the parties by the Court's assertion of original jurisdiction over their controversy and calls for a summary overruling of New Mexico's first exception.



## II.

**The Compact and the Court's prior decisions in this case establish that New Mexico must repay the water it illegally withheld from Texas for the 1950-1983 period.**

For nearly thirteen years, this litigation has been directed towards a determination of how much water New Mexico owes Texas as a result of New Mexico's failure to abide by the obligations it assumed in Article III(a) of the Compact.<sup>2</sup> The Court remanded the case to the Special Master in 1983 for a final decision on that very issue. 462 U.S. at 574-75. In its second exception, New Mexico asks the Court to declare that these exertions were for naught and hold that New Mexico may not be held liable for Article III(a) violations.<sup>3</sup>

If adopted, New Mexico's position would convert this case into a pointless exercise, constituting nothing more than an

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2. From the inception of the suit, New Mexico has understood that Texas was seeking an order requiring New Mexico to repay the past due water. Tr. 58 (5/20/86) (principal New Mexico water official acknowledges the point). See, e.g., New Mexico's Trial Brief Pursuant to Paragraph 5(a)(4) of the Special Master's Pre-Trial Order of October 31, 1977 (Aug. 1, 1978) (at 22: "Texas claims that it is entitled to damages and to performance . . ."). Yet, it did not raise the issue until the very end of the last of a long series of evidentiary hearings spanning twelve years. Once again, the Special Master told New Mexico that if it were a private litigant he would rule that "it was too late to raise it by a long shot." Tr. 436 (5/21/86). Nonetheless, once again, because of New Mexico's quasi-sovereign status, he allowed the issue to be raised. *Id.* See also 1986 Report 38. New Mexico's acquiescence to twelve years of litigation of the issue and its failure to object to any of the vast amount of evidence offered on the issue constitutes a waiver of its second exception. Furthermore, the law of the case precludes New Mexico's second exception.

3. New Mexico's position is even more extreme than the text states. In an appendix to the brief supporting its exceptions, New Mexico argues against inclusion in the decree of a provision requiring New Mexico to fulfill its Article III(a) obligations in the future. New Mexico's Exceptions, Appendix A, para. 1. New Mexico did not except to the Master's recommendation to insure future compliance, see 1986 Report 42-46, and, therefore, is now bound by it; nonetheless, through the objection, New Mexico has plainly asserted the view that it may violate the Compact at will without any legal accountability.



expensive, extended seminar for the Court on advanced mathematical techniques and hydrology. Even worse, it would render the Compact a nullity and threaten compacts as viable solutions to interstate disputes. Nothing in the Compact's language, the Compact's history, or the facts of this case justifies the result New Mexico seeks. On the contrary, these sources amply support the Special Master's recommendation that New Mexico repay Texas the 340,100 acre-feet of water it illegally withheld from Texas during the 1950-1983 period.

The Compact abounds with language demonstrating that it apportioned the water of the Pecos River between the two states and imposed on New Mexico a legal duty to deliver Texas its water in accordance with the apportionment. The preamble explains that the two states have agreed on the "apportionment and deliveries" of the water. Article I lists the "equitable division and apportionment" of the water as the first major purpose of the Compact. The linchpin of the Compact, Article III(a), establishes New Mexico's specific delivery duty in mandatory terms:

New Mexico *shall not* deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which *will give* to Texas a quantity of water equivalent to that available to Texas under the 1947 condition.

(Emphasis added).

Article VI establishes governing principles for the "apportionment" accomplished in Article III(a). One of the governing principles requires that the accountings be done annually using progressive three-year averages. See Article VI(b). Article VIII speaks of the "obligations" of the Compact. Article IX refers to "maintaining" the state line flows "required" by the Compact. Article X establishes that Texas has a "right" to the water "apportioned to it" by Article III(a), as does Article XIV in its reference to "rights established" under the Compact. Finally, Article XV mandates that the Compact become "binding and obligatory" as of June 9, 1949, the date of Congressional consent.

From the perspective of whether the Compact creates an enforceable legal relationship between Texas and New Mexico regarding the waters of the Pecos River, the Compact's language could not be clearer. New Mexico's attempted elucidation of standards for determining implied obligations is irrelevant. See New Mexico's Exceptions 30 (discussing when an obligation is implied). The obligation here is explicit. The Compact *apportions* Pecos River water between New Mexico and Texas; it *obligates* New Mexico to deliver Texas' apportioned share annually to Texas according to the Article III(a) measure; and it gives Texas the *right* to the annual deliveries of its apportioned share.

That the Compact contemplates that New Mexico shall be held accountable for any failures in meeting its delivery obligations is established by more than just its plain language. In explaining the meaning of the Compact to the Compact negotiators, Mr. Tipton, the Chair of the Engineering Advisory Committee at the time the Compact was negotiated, provided straightforward support for the interpretation demanded by the Compact itself—that is, that it creates a legally enforceable, annual delivery obligation. Regarding Article III(a), Mr. Tipton stated:

What it means is that of a given inflow Texas will receive *each year* essentially the same proportion which she received under the "1947 condition."

Subparagraph (a) of article III is a *firm obligation* on the part of New Mexico to see that Texas receives that quantity of water, and there is nothing in article III or any other place in the compact which affects in any way the obligation of New Mexico to deliver this amount of water . . .

Stip. Exh. 1, S. Doc. 109, 81st Cong., 1st Sess. (1949), at 116 [hereinafter, "S. Doc. 109"] (emphasis added). Immediately following this explanation, the Texas legal advisor engaged Mr. Tipton in a colloquy:

JUDGE KERR. [I]s it possible to determine the exact amount of water which Texas would be entitled

to receive under the varying conditions which are set out in that report?

MR. TIPTON. Yes, that is correct.

*Id.*

Even if the Compact were otherwise ambiguous, the import of these explanations is unmistakable: for each year of operation under the Compact, Article III(a) requires New Mexico to deliver to Texas a determinable amount of water. A failure to do so renders New Mexico legally accountable.

New Mexico's brief is unencumbered by a discussion of the Compact's language or Mr. Tipton's explanation of the firm annual obligation it creates. Instead, it devotes itself to a lengthy explanation of why the Compact included neither a schedule nor a system of debits and credits, arguing that, therefore, it need not meet its annual Article III(a) obligation. New Mexico's Exceptions 24-29. The premise is correct, but the conclusion drawn from it is fundamentally wrong, as the discussion above demonstrates. A very brief detour into the arcane world of interstate water compacts will help explain why New Mexico's discussion is off the mark. A compact that apportions interstate waters by a schedule of deliveries typically will include a system of debits and credits to impart some flexibility to the rigidity of a fixed delivery schedule. *See, e.g.,* Rio Grande Compact, 53 Stat. 785 (1939). Because the Pecos River basin is hydrologically complex, 1979 Report 5-6, a somewhat more flexible obligation was established so that the interrelationships of the complex factors affecting it could receive more attention. S.Doc. 109, at 117. Instead of stating New Mexico's obligation in terms of a schedule (*e.g.,* New Mexico shall deliver X acre-feet per year to Texas), Article III(a) states the obligation in terms of a standard that incorporates the complex factors—the 1947 condition. Thus, the absence from the Compact of a schedule and a debit-credit system says nothing about whether New Mexico must pay back water it agreed to but did not deliver to Texas.

The concept that an entity such as New Mexico should have to return something (such as the water in this case) that it has

obtained illegally to those who have a legal right to it is not exactly revolutionary. The Court has stated:

[T]he obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.

*Ward v. Love County*, 253 U.S. 17, 24 (1920). In that case, a county had collected taxes on Indian allotments. A legal attack on the authority to collect them succeeded, and the Court ordered the county to repay the taxes.

Putting aside the language of the Compact anticipating the possibility that judicial enforcement of its terms might be necessary, *see* Article V(f) (Compact Commission findings not conclusive "in any court"), this Court has the power to determine the nature and extent of compact obligations between states. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). In doing so, the Court may fashion appropriate relief. *Cf. Bell v. Hood*, 327 U.S. 678, 684 (1946) (courts adjust remedies to grant necessary relief where federal rights are invaded); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (basic rule is that courts give a remedy for violation of a legal right).

Even in original jurisdiction controversies between sovereign states, such fundamental maxims of judicial power apply. "That judicial power essentially involves the right to enforce the results of its exertion is elementary." *Virginia v. West Virginia*, 246 U.S. 565, 592 (1918). In the past, the Court has been unswerving in ordering states to perform obligations to another state which they have assumed under compacts and then breached. *See, e.g., West Virginia ex rel. Dyer v. Sims, supra*, 341 U.S. 22 (state's agreed-upon contribution to compact administration to be paid, notwithstanding contrary state law); *Kentucky v. Indian*, 281 U.S. 163 (1930) (specifically enforcing state's agreement to construct a bridge). This principle extends to requiring the payment of money for a breached obligation. *Virginia v. West Virginia, supra*, 246 U.S. 565.

The same legal principles apply here. The Compact imposes annual delivery obligations on New Mexico and creates a concomitant legal right in Texas to those deliveries. New Mexico has breached those obligations, and Texas seeks recompense. It is the Court's function to order that the recompense be provided, and nothing in the compact withdraws that function. As the Court has explained:

It cannot be gainsaid that in a controversy with respect to a contract between states, as to which the original jurisdiction of this court is invoked, this court has the authority and duty to determine for itself all questions that pertain to the obligations of the contract alleged.

*Kentucky v. Indiana, supra*, 281 U.S. at 176. New Mexico was to deliver determinable amounts of water to Texas for the 1950-1983 period. The Court's authority and duty is to "enforce the result of its exertion[s]" in this case and order payback of the shortfall.

This historical background reveals that, after decades of acrimony between the two states over the Pecos River, Texas was persuaded to take the compact route to apportionment of the water rather than the route of equitable apportionment through litigation. *See, e.g.*, S. Doc. 109, at 4-8. *See also* 462 U.S. at 569 (threat of litigation prompted New Mexico's agreement to the Compact). Many times, this Court has encouraged the use of compacts to resolve interstate water conflicts and suggested that disputing states take the route chosen by Texas. *See, e.g., Colorado v. Kansas*, 320 U.S. 383, 392 (1943). The Court's adoption of New Mexico's position that an upstream state remains legally unfettered by its solemnly undertaken delivery obligations would constitute a cruel trick, not only to Texas in this case, but to any state that has taken the Court's admonitions to heart and foregone its equitable apportionment option. Texas did not bargain away its right to seek an equitable apportionment of the river in exchange for the sole relief New Mexico proposes—that is, gradual future adjustments in New Mexico's water consumption patterns that might, but would not necessarily, even more gradually increase state line flows in the future. As the Special Master cogently explains, such



relief would be meaningless and would convert the Compact into an "illusory contract." 1986 Report 40-41. This Court's 1983 decision foredooms New Mexico's argument: "It is difficult to conceive that Texas would trade away its right to seek an equitable apportionment of the river in return for a promise that New Mexico could, for all practical purposes, avoid at will." 462 U.S. at 569 (footnote omitted).

As a last resort, New Mexico simply claims that it would be inequitable to require it to pay Texas the water it owes.<sup>4</sup> Engaging once again in its penchant for trying to rejuvenate issues already resolved against it, New Mexico suggests a laches defense, New Mexico's Exceptions 32, already rejected by the Court when it approved in full the 1979 Report. 446 U.S. 540 (1980). If the equities are to be weighed, the balance tips decidedly in favor of Texas, which has been deprived over a thirty-four year period of water to which it remains legally entitled. Thirteen years of litigation have been directed at quantifying this amount with reasonable specificity, yet New Mexico has not take a single step to increase its deliveries to Texas. Tr. 55 (5/20/86). Moreover, it adamantly refuses to abide by its Compact obligations until ordered by the Court. New Mexico's chief water official testified in the concluding phase of the hearings before the Special Master:

MR. REYNOLDS. I can not and will not in administration try to enhance state-line flow until there is a Commission finding or a court decree saying that that's necessary.

Tr. 55 (5/20/86).

The Court already has ruled against New Mexico on the issue of whether it can be required to pay back to Texas the water it failed to deliver in accordance with its legal obligations under

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4. To evade its Compact obligations, New Mexico enlists the aid of *Wyoming v. Colorado*, 309 U.S. 572 (1940), in which the Court refused to issue a contempt citation against a state for a minor violation of an earlier equitable apportionment of a river. There is no legal similarity between the *Wyoming* case and this one. The violations here are massive and longstanding. In addition, this litigation is at the relief stage. The onerous burdens of proof applicable in a contempt proceeding are absent here.



the Compact. The 1983 decision does not need to be revisited. Through its second exception, New Mexico indicates that only strong words and explicit directives will suffice to impress upon it the meaning of a legal obligation and the importance of having even a sovereign state abide by a federal law to which it has consented. Texas urges the Court to provide New Mexico such words and directives.<sup>5</sup>

### III.

**The Special Master's recommended relief, including the provisions that New Mexico's water debt be repaid in thirteen years, that it be repaid in water, and that water interest be imposed if New Mexico acts in bad faith, is proper and based on a consideration of all relevant factors.**

New Mexico's final exception is to the details of the retroactive relief recommended by the Special Master. Only three specific complaints are made: to the ten-year payback period;

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5. Eight New Mexico municipalities have filed an *amici curiae* brief arguing that the Eleventh Amendment prohibits the Court's assertion of jurisdiction in this case and that the Court's doctrine for determining whether a private right of action is implied operates here to deny Texas retroactive relief under the Compact. The *amici* cities' Eleventh Amendment argument ignores two points. First, once it is delivered, the water is the property of the state, not of its citizens. See TEXAS WATER CODE ANN. § 11.021 (Vernon Supp. 1987). Second, the Court already has held that the Eleventh Amendment defense is inapplicable in interstate water disputes between two states. See, e.g., *Colorado v. New Mexico* 459 U.S. 176, 182 n.9 (1982). The *amici* cities' second argument cuts in favor of Texas, rather than against it. First, a basic reason for the Court to engage in its implied rights of action analysis is to determine whether a written provision gives private individuals a cause of action in addition to the governmental right of action apparent on its face. Here, a governmental right of action is at issue, not a private one. The governmental right of action is apparent on the face of the Compact. Second, even if the implied private rights of action analysis were applicable, it would support Texas' position. The key inquiry is into the intent of the provision. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 13 (1981). The inquiry starts with the language of the provision to determine whether it is phrased in terms of the persons benefited, *Cannon v. University of Chicago*, 441 U.S. 677, 692 n.13 (1979), and whether it is in mandatory terms, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 18 (1981). The intent of Texas and New Mexico is obvious. Texas is the stated beneficiary, and the obligation on New Mexico is stated as a mandate.

to the water interest provision; and to the requirement that the debt be repaid with water. New Mexico also registers a generalized complaint that the Special Master did not "balance the equities," but it points to no legal flaw, other than the three already listed, which flows from this generalized grievance. Therefore, the Court is only given three specific objections for resolution. The generalized complaint raises no separate legal issue; however, because it is used to color New Mexico's specific arguments, it will be discussed first.

### Generalized Complaint

The dissatisfaction with the Special Master's resolution which New Mexico voices in its general complaint that he did not balance the equities properly is, upon analysis, only the expression of a vague, unfocused displeasure with the results of his balancing efforts. It is exemplified by New Mexico's castigation of the Special Master for what it claims is a lack of caution in approaching his responsibilities. New Mexico's Exceptions 35.<sup>6</sup> Much of the argument supporting the vaguely-expressed dissatisfaction is devoted to deriding the Special Master for remedial recommendations in his *draft* report of March 18, 1986. The problem with New Mexico's complaint in this regard is obvious. The March 18th document was a draft report, specifically issued to give the litigants an opportunity to level criticisms at it while the Special Master still had it within his power to respond. See, e.g., Tr. 315 (12/4/85); Tr. 2-3 (4/16/86) (explaining purpose for issuing report in draft form first). Not only did the Special Master devote an entire day on April 16th to oral argument on the draft report, he acceded to New Mexico's request for a hearing on relief and remedy, which was conducted over a two day period in May, 1986.

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6. Running as an undercurrent through New Mexico's exceptions is the suggestion that the Special Master was unfair to New Mexico. See New Mexico's Exceptions 12 (accusing him of "cut[ting] short" the proceedings); 14 (claiming he "skimmed over" a key matter, "passed [it] by swiftly," and "bolstered" his views with Texas evidence); 17 (accusing him of giving "short shrift" to a matter); 18 (claiming he "skated quickly" to decision); 33-34 (asserting he "plunged into" an issue); 35 (claiming he failed to use "the caution warranted"); and 39 (arguing that a recommendation is an "offense to New Mexico"). These examples may be only rhetorical excesses;

(Footnote continued on next page)

New Mexico's generalized complaint that the Special Master recommended the relief without balancing the equities is transparently wrong, as a perusal of the longest section of his Report reveals. 1986 Report 30-46 (section on remedy). As explained below, he gave detailed consideration to each specific exception New Mexico raises. The real problem lies elsewhere, in the origins of New Mexico's misdirected effort to lodge a generalized complaint unanchored to any specific resulting recommendation other than the three discussed below. New Mexico is trying to force arguments with some applicability to an equitable apportionment case into a compact case mold. Broad appeals to balancing the equities have a place in equitable apportionment jurisprudence, which is based on a "flexible doctrine" requiring delicate equity adjustments. *See, e.g., Colorado v. New Mexico*, 459 U.S. 176, 183 (1982). The broad appeals are inapposite here.

In the context of interstate water compacts, the difficult reconciliation of competing interests is performed by the contracting parties and embodied in the compact. The equities already have been balanced before the matter becomes one of

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(Footnote 6. continued from previous page)

however, they leave the aftertaste left by a direct allegation of unfairness. Reality belies this suggestion. Over objections from Texas, the Special Master repeatedly acceded to belated demands from New Mexico that it be allowed to present evidence on and raise major issues that, in typical civil litigation, would have been rejected. He allowed New Mexico to surprise Texas with the technically complex issue of the Capitan Aquifer, despite New Mexico's never specifying it as an issue in the twelve years it had known about it. Tr. 33 (11/19/85); Tr. 269 (12/4/85). He allowed New Mexico an evidentiary hearing on remedies after argument on the draft report and after having repeatedly warned New Mexico earlier that the late 1985 hearings were the last evidentiary hearings. Tr. 370-71 (12/4/85); Tr. 93, 113-14 (4/16/86). At the hearing on remedies, he allowed New Mexico to adduce evidence on Tex. Exh. 79 despite the fact that it had been admitted by stipulation six months earlier and despite the fact that the hearing was supposed to be on other topics. Tr. 322 (5/21/86). Finally, he allowed New Mexico to raise and brief the issue of retroactive relief after the last hearing and in spite of New Mexico's failure to raise the issue during twelve years of litigation devoted exclusively to the facts underlying the issue. Tr. 436 (5/21/86). The Special Master was highly indulgent of New Mexico's proclivities to extend the proceedings through the last-minute injection of new issues. No fair-minded reading of the record can result in any other conclusion than that New Mexico was given a full and fair opportunity to present its case. That it failed cannot be blamed on the Special Master.

judicial concern. Often, the compact balances interests differently than the Court, acting without textual guidance, would. Article X of the Compact exemplifies the difference. In an equitable apportionment case, failure to use water typically results in a relinquishment of the right to it. *See, e.g., Colorado v. New Mexico, supra*, 459 U.S. at 184-85. In Article X, on the other hand, Texas and New Mexico agreed that non-use by one state does not effectuate relinquishment.

Thus, the Court should not allow New Mexico's generalized complaint about balancing the equities to cast an unfavorable light on complaints about specific portions of the remedial recommendations. The record reveals that the Special Master's recommendations are based upon a thorough assessment of the equities lying on both sides but within the confines of the Compact.

#### **Ten-year payback period**

New Mexico's specific objection to the delivery requirements which the Special Master recommends is to the ten-year payback period. New Mexico does not offer the Court any recommended alternative payback period or any standard for determining it.

Actually, the recommended payback period extends much longer than ten years. The payback would be for water owed only through 1983, it would run only from the date a decree is issued by the Court, and it would include an initial three-year grace period. Thus, assuming the Court enters a decree in July, 1987, Texas would finally have received the water New Mexico illegally withheld from it through 1983 in the year 2000. This is a seventeen year payback period. If anything, the equities favor a shorter payback period because, assuming New Mexico complies in good faith with the decree, Texas will receive no interest on the water illegally withheld from it over a thirty-four year period. In effect, New Mexico will have retained in some measure the fruits of its illegal actions for over a half century without paying any penalty. By any standard, this result is not unfair to New Mexico.

The Special Master gave careful consideration to the concerns



New Mexico expressed about the payback period. Even though he recognized that "the longer Texas must wait [for the water], the less the value of what she receives," 1986 Report 42, the Special Master recommended that New Mexico be given a three-year grace period to make preparations for its repayment deliveries. *Id.* 36. Notwithstanding Article X of the Compact, he even took into account whether Texas could use the water and concluded that "[c]learly, Texas can make use of the water that it is entitled to but has been deprived of for the last 30 years." *Id.* 42.

### Water interest

New Mexico devotes a short two paragraphs to its argument against the inclusion of any water interest requirement in the decree. New Mexico's Exceptions 39. Any evaluation of the validity of this component of the recommended relief must begin with a recognition that it is not "interest on a judgment" as that concept typically is understood. First, it is contingent. It would not accumulate at all if New Mexico operates in good faith under the decree. Second, even if New Mexico did not operate in good faith, the interest would not begin to accumulate until at least five years after the payback period begins to run. Under the assumption that the Court enters a decree in mid-July, 1987, the earliest the interest could begin to accumulate would be the middle of 1995, twelve years after the last of the illegal water diversions adjudicated in this case.

Thus, the Court cannot evaluate the challenged water interest concept under legal standards derived from decisions about whether interest on a judgment is permissible. Instead, the concept must be evaluated as would any other provision in an equitable decree. Is it carefully crafted to remedy the harm done?

When a federal statute creates an obligation but contains no prohibition of interest on the obligation, the Court "weighs the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed." *Rodgers v. United States*, 332 U.S. 371, 373 (1947). The general rule is that the equities will be weighed to allow interest for the party to which the obligation is owed and which has been harmed by a breach

of the obligation. *Id.* Application of these equity principles to this case easily supports the Special Master's interest recommendation. The Compact is a federal law, 462 U.S. at 564, containing no prohibition on the award of interest for breaches of the obligations it creates. New Mexico has breached its obligation to Texas which has been harmed by the breach. As *Rodgers* holds, the interest in such a situation may be awarded to insure full compensation for the loss. It surely follows then that the recommended water interest, which is only contingent and does not extend itself even as far as the *Rodgers* principle, is appropriate.

### Monetary alternative

New Mexico concludes its exceptions with a request that the Court allow it the option of repaying its water debt to Texas in money. New Mexico's Exceptions 39-40. The use of the term "request" is deliberate. New Mexico offers no argument in support of the request and cites no authority in support of it. The real reason for the request is revealed in its last sentence. *Id.* 40. The Court's granting of it would necessitate a remand to the Special Master for further evidentiary proceedings because no hearing has been conducted on the fair market value of the water New Mexico owes Texas. New Mexico never availed itself of the opportunity to request such a hearing and never posited the monetary alternative as a legal issue. There is no basis for further delaying the resolution of this case by indulging once again New Mexico's habit of manufacturing new issues which inevitably result in the postponement of its day of reckoning under the Compact. In the past the Court has ordered a state to perform the specific obligation it had assumed but breached. See *Kentucky v. Indiana, supra*, 281 U.S. 163. It should do the same here. New Mexico has failed to perform its water delivery obligation to Texas. After thirty-seven years under the Compact and thirteen years of litigation before this Court, New Mexico should finally be required to fulfill its broken promise to Texas. It has no further excuses for delay. Texas' portion of the Pecos River should be returned to it in accordance with the Special Master's recommendation.



## CONCLUSION

For the foregoing reasons, the exceptions of the State of New Mexico to the Report of the Special Master should be overruled. "A river is more than an amenity, it is a treasure." *New Jersey v. New York*, 283 U.S. 336, 342 (1931). After formally agreeing with Texas to the division of the treasure, New Mexico withheld a large part of it. The Special Master's Report recommends a final resolution of this case which will restore to Texas its bargained-for share of the treasure and insure it receives its share in the future.

Respectfully submitted,

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*January 20, 1987*

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NO. 65, Original

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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STATE OF TEXAS, *Plaintiff,*

v.

STATE OF NEW MEXICO, *Defendant,*  
and

UNITED STATES OF AMERICA, *Intervenor.*

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Before the Special Master: Charles J. Meyers

**PRETRIAL ORDER**

The proceedings in this matter shall be governed by the following order.

I. Hearing.

A Hearing on the disputed issues of fact listed below shall be held in Denver, Colorado, on November 18-22, 26-27 and if necessary on December 3-4, 1985.

II. Disputed Issues of Fact.

A. Texas Statement.

The computation of indicated departures.

1. What is the proper loss equation for channel loss, Artesia to Damsite 3, for the 1954-83 period?
2. What are the proper area-capacity relations to be used to compute evaporation losses from the McMillan and Avalon Reservoirs for the 1950-83 period?

3. Are the evaporation losses from Tansill Lake to be counted as depletions between the Carlsbad canal flume and the Carlsbad gage in the flood inflow computations for the 1950-83 period?

The causes of depletions.

4. During the 1950-83 period:

- (a) was there any increase or decrease in depletions due to man's activities above Alamogordo Dam and, if so, how much were they?
  - (b) were there any depletions resulting from construction of the training dike in Lake McMillan in the early 1950's and, if so, how much were they?
  - (c) were there any depletions above the stateline gage which are assignable to Texas and, if so, how much were they?
  - (d) were there any depletions above the stateline gage caused by the transfer of water rights from downstream of Alamogordo Dam to upstream of it and, if so, how much were they?
5. Are the indicated departures, if any, to be adjusted for the matters referred to in 4(a)-(d), above, to arrive at New Mexico's delivery obligations under the Pecos River Compact ("Compact") for the 1950-83 period?

B. New Mexico Statement.

The computation of indicated departures.

1. Whether the loss equation for channel loss, Artesia to Damsite 3, for the 1954-83 period shall be developed using the least absolute value procedure, as was done in defining the 1947 condition, or a modified least absolute value procedure.

2. Whether the area-capacity relation for a given sediment survey should be used to compute evaporation losses from the McMillan and Avalon Reservoirs until the next survey is available or whether a particular sediment survey should be used to compute evaporation losses for a period of years before and after the date of the survey.
3. Whether evaporation losses from Tansill Lake should be excluded as a depletion between the Carlsbad canal flume and the Carlsbad gage in the flood inflow computations as was done in defining the 1947 condition.

The causes of depletions.

4. During the 1950-83 period:
  - (a) was there any increase or decrease in depletions due to man's activities above Alamogordo Dam and, if so, how much were they;
  - (b) what were the depletions caused by the training dike constructed in Lake McMillan in the early 1950's;
  - (c) were there any depletions above the stateline gage which are assignable to Texas and, if so, how much were they?

### III. Disputed Issues of Law.

#### A. Texas Statement.

- a. Is New Mexico prohibited from reducing its delivery obligations under the Compact for reductions, if any, in depletions by man's activities above Alamogordo Dam?
- b. Are the depletions, if any, that were caused by the construction and use of the training dike in Lake



McMillan assignable as depletions due to man's activities?

- c. What is the appropriate form of relief for New Mexico's violations, if any, of its delivery obligations under the Compact for the 1950-83 period?
- d. Is prospective relief available and proper and, if so, what is its appropriate form?

B. New Mexico Statement.

- a. Should the procedures used to determine indicated departures for the 1950-83 period be consistent with the procedures used to determine the 1947 condition.
- b. Are Texas and New Mexico prohibited by the Compact or precluded by the prior rulings in this case from claiming adjustments in indicated stateline departures for any increase or decrease in depletions by man's activities above Alamogordo Dam.
- c. Are the depletions, if any, during the 1950-83 period that were caused by the construction and use of the training dike in Lake McMillan assignable as depletions due to man's activities.
- d. Whether the Pecos River Commission's findings on indicated departures for the 1950-61 period preclude Texas from litigating matters of fact that were previously resolved by the Commission.

[Paragraphs IV-VI omitted]

DATED: October 10, 1985.

/s/

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Charles J. Meyers  
Special Master



## APPENDIX B

RESPONSE TO NEW MEXICO'S OBJECTIONS  
TO PROPOSED DECREE

In Appendix A of its exceptions, New Mexico makes six objections to the Special Master's proposed decree. Texas supports the Special Master's proposed decree, with the modifications proposed by Texas in Appendix B of its exception, and requests that it be entered by the Court. Texas will respond to New Mexico's objections in the numerical order in which they are set out in Appendix A to New Mexico's exceptions.

1. Sections II(A) and II(B) of the proposed decree do not deprive the Pecos River Commission of its discretionary powers under the Compact. The Court has previously determined that, where the Commission has not adopted "a more feasible method" for determining departures, the Court may decide whether a particular method may be used under the provisions of the Compact to measure departures in enforcing the Compact. See *Texas v. New Mexico*, 462 U.S. 554, 573 (1983). The Court made such a decision regarding Tex. Exh. 68 when it approved the 1984 Report, thereby adopting the Special Master's recommendation that the inflow-outflow equation in Tex. Exh. 68 at page 2 be used to determine departures from New Mexico's Article III(a) delivery obligations. *Texas v. New Mexico*, 467 U.S. 1238 (1984). Similarly, the Court may, and should, decide that Tex. Exh. 79 will be used to calculate the index inflow component of the inflow-outflow equation in Tex. Exh. 68 at page 2, as specified in Section II(B) of the proposed decree.

The equations and procedures in Tex. Exh. 79 will allow the Commission to accurately compute flood inflows in future years. If the states eventually determine and agree that the equations or procedures in Tex. Exh. 79 should be changed, or that a different method of river accounting should be adopted, the states may jointly apply to the Court to lift or modify the injunctive provisions of the decree.

2. The appointment of a river master is permissible and warranted if the Court determines that it is necessary to enforce

the Court's decree. The Special Master noted that the Court might wish to appoint a river master "for the sole purpose of determining whether New Mexico has complied with the decree." 1986 Report 43. Certainly the Court is free to fashion such relief as is necessary for that purpose.

Texas is not now requesting the Court to appoint a river master. Texas believes that the Special Master's proposed decree contains the mechanisms and sufficient incentive for compliance and would, if adopted by the Court, adequately protect Texas' interests in this matter. Should New Mexico later prove unwilling to comply with the decree, Texas may, to secure compliance, either request the appointment of a river master or move for the entry of an order of contempt.

3. New Mexico's complaint regarding Section II of the proposed decree, that certain adjustments are not included in either Tex. Exh. 68 or in Tex. Exh. 79, is wholly without merit, since the Special Master has recognized that Tex. Exh. 79 will have to be modified or adjusted to conform to the Court's decisions on man-made depletions chargeable to New Mexico. 1986 Report A-1, n.1.

4. Section II(A) of the proposed decree correctly requires that the inflow-outflow equation in Tex. Exh. 68 at page 2 be used to determine New Mexico's Article III(a) delivery obligation. This is in conformity with the Court's approval of the 1984 Report in which the Special Master recommended that the equation be used for this purpose. 467 U.S. 1238 (1984).

Ignoring this prior approval by the Court, New Mexico argues that the inflow-outflow equation in Tex. Exh. 68 at page 2 must be adjusted for variations in factors such as the location of flood inflows, reservoir operation, and precipitation. This argument, however, overlooks the fact that the inflow-outflow equation was derived from many years of complex hydrologic data, which included variations in such factors, and the equation is, therefore, designed for, and compatible with, complex hydrology. See Tex. Exh. 68 at 1-19. The argument also ignores the adjustment flexibility inherent in the progressive three-year averages required by Article VI(b) of the Compact.

5. Section II(C) of the Special Master's proposed decree is clear that no more than 340,100 acre-feet of water are required to be repaid to Texas over a ten-year period. New Mexico is to satisfy this repayment duty by delivering to the Texas state line, during each year of the ten-year period, an Annual Minimum Delivery Obligation of at least 34,010 acre-feet, after having delivered its annual delivery obligation under Article III(a) of the Compact. Any quantity of water delivered in excess of the Annual Minimum Delivery Obligation would necessarily be credited towards, and reduce, the total amount required to be repaid.

6. The reference in Section IV of the proposed decree to "Section II(B)" is obviously a typographical error. The correct reference should be to "Section II(C)," as was pointed out on page 6 of Texas' exception.